

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

KATHRYN TOWNSEND GRIFFIN, *et al.*,

Plaintiffs,

v.

17 Cv 5221 (LLS)

EDWARD CHRISTOPHER SHEERAN,
personally known as Ed
Sheeran, *et al.*,

Defendants.

New York, N.Y.
April 26, 2023
11:10 a.m.

- And a Jury -

Before:

HON. LOUIS L. STANTON,

District Judge

APPEARANCES

FRANK & ASSOCIATES PC

BY: PATRICK RYAN FRANK

KEISHA RICE

KATHERINE VIKER

- AND -

BEN CRUMP LAW

BY: BEN CRUMP

Attorneys for Plaintiffs

PRYOR CASHMAN LLP

Attorneys for Defendants

BY: ILENE SUSAN FARKAS

DONALD S. ZAKARIN

ANDREW MARK GOLDSMITH

BRIAN MAIDA

1 (In robing room; jury not present)

2 THE COURT: What now? It's a little messy if we're
3 doing it in the courtroom and we go in and out, and they're
4 wondering what's going on.

5 MS. FARKAS: Of course.

6 THE COURT: And here, it really sort of gets settled,
7 and you come out when you've had a majestic conference.

8 MS. FARKAS: Basically, to cut to the chase, we got
9 new slides last night around midnight for Dr. Stewart's
10 testimony.

11 THE COURT: That's early.

12 MS. FARKAS: I guess it was before midnight, with no
13 explanation as to what has been changed, whether new slides
14 have been added.

15 As you point out, before we call the jury in and make
16 it a majestic moment, we wanted to bring it to your Honor's
17 attention. To the extent that there are new slides, we would
18 like to know that now. To the extent that there have been
19 changes in the slides, we'd like to know that as well.

20 THE COURT: Sure. Which are the new ones?

21 MR. FRANK: There aren't any new ones, your Honor.
22 What has changed is our expert last night, just to add to the
23 slide. If you look at each of the slides, there is an
24 attribution, a citation to a source at the bottom. And he's
25 added those. He's augmented the sources for them. The

1 substance of the exhibit has not changed.

2 THE COURT: At all?

3 MR. GOLDSMITH: That's not true, your Honor. I've
4 reviewed the slides, and I've already noted at least three
5 changes from what they had sent us previously. I can show you.

6 MR. FRANK: Show me the changes.

7 MR. GOLDSMITH: Do you have the most recent deck?

8 MR. FRANK: Sure.

9 MR. GOLDSMITH: Do you have the older one?

10 These two in parentheses were never there before. The
11 same on this slide, never there before. And that was never
12 there before. That's just what I noticed. I don't know if
13 there's anything more than that.

14 MR. FRANK: We've had a previous slide with the exact
15 same material. I don't understand. We've given you the slides
16 before. I don't know what that means.

17 THE COURT: That's what he'd like to know.

18 MS. FARKAS: Your Honor, part of the problem is there
19 is -- for example, there is one melodic element at issue, which
20 is --

21 MR. FRANK: There are three.

22 MS. FARKAS: I know. I'm taking them one at a time.

23 One of the melodic elements at issue is the opening
24 melody, but they have various slides purporting to analyze that
25 particular melody in different ways. That's their choice. I

1 can cross-examine him on that.

2 But to make changes to one slide -- because they're
3 analyzing it in different ways, if they say, well, that was on
4 one slide and it wasn't on another slide, it makes a difference
5 to us. It's a substantive difference, and he's now making
6 changes to his different analyses.

7 MR. GOLDSMITH: As I pointed out, there are changes.
8 You stated there were no changes. You seem to not be aware
9 yourself of the changes. We need to know if there are any
10 other changes.

11 MR. FRANK: I see what he did here. First of all, I
12 did say there were changes. He changed the sources. At the
13 very, very bottom of the thing, he changed these on the
14 exhibits to identify what the source is to give them more
15 information.

16 What they're complaining about is this, these two in
17 parenthesis. I see what he did. He's always had this passing
18 tone. He's just put these two 2 notes to demonstrate what he's
19 been testifying to. It's the same opinion he's had, but he's
20 just depicting it differently. But it's the same opinion. He
21 just put them into parenthesis to show that they're passing
22 tones. That's all he did.

23 THE COURT: But if they're not the same numbers, then
24 they indicate different tones.

25 MR. FRANK: They are the same numbers.

1 MS. FARKAS: They weren't in the slide before midnight
2 last night. We can talk about the significance of passing
3 tones. That's not the point. The point is there have been
4 changes in the slides and we don't know which slides have been
5 changed.

6 Mr. Frank came in here and said, no. No. It's just
7 the sources. He then came in here and tried to make it a
8 nonpoint. The hundred slides that support Dr. Stewart's
9 analyses we saw for the first time a week ago. These are new
10 analyses. We'll deal with that I guess on cross.

11 But this is brand new analyses, brand new
12 transcriptions, that have never been in this case in six years.
13 Okay. They changed them before Monday's exercise when he got
14 on the stand. okay.

15 Now they've changed it again, midnight in the middle
16 of his testimony. We're simply asking to know what he changed.
17 If Mr. Frank is unable to walk us through what has been
18 changed, we're concerned about that.

19 THE COURT: Mr. Crump, what do you think?

20 MR. CRUMP: I remember yesterday, Judge, in court them
21 offering emails. I noticed them. I had no problem with them
22 because I genuinely believe in everything going in. The jury
23 can sort stuff out. They can cross.

24 That's how I felt, yesterday, what he did. I could
25 cross on it. Genuinely I want them to try their case. We want

1 to try our case. They shouldn't try and dictate how we try our
2 case. And I promise you, Judge, we won't dictate how they try
3 their case.

4 THE COURT: Okay. Do you know what substantive
5 changes have been made? What he picked out as a slide, let's
6 talk about it.

7 Can you, fairly rapidly, determine whether it has a
8 change or not?

9 MR. GOLDSMITH: I can't. I'm, unfortunately, not that
10 talented that I can remember exactly what it was before as to
11 what it is now.

12 THE COURT: You have them from yesterday.

13 MR. GOLDSMITH: I don't have it printed out. It would
14 be very difficult to do it as we go along.

15 MS. FARKAS: The other option is that Dr. Stewart be
16 required to identify.

17 MR. GOLDSMITH: I think it would be better if
18 Dr. Stewart could just tell us which slide has been changed.
19 It sounds like maybe it's only these three. If there are no
20 more, then we know what has been changed. So why can't we just
21 ask Dr. Stewart to tell us right now he changed.

22 THE COURT: That's direction I had been headed. My
23 thought was he should do it before each slide before he gets to
24 that slide. One way of enforcing that is to say you can, at
25 that point ask him, were there any changes on this slide from

1 the ones you gave us before, any changes at all. And let's get
2 his answer on the record.

3 MR. GOLDSMITH: Are you suggesting during
4 cross-examination?

5 THE COURT: I don't think so traditionally. "By
6 Mr. Crump." We're trying a case. I'll give you the right
7 to -- I don't know what it's called. It's called an
8 interruption. You can call it "Preliminary Cross-examination"
9 if you wish.

10 When he starts dealing with a slide, I'll let you ask
11 him the question, is there any change from this slide that you
12 gave us last night from the previous slide. And you can do it
13 on each one. They may get the idea that there is some sort of
14 linked changes in this case, a moving target, which we've had,
15 God know, for six months.

16 MR. GOLDSMITH: While we're all here, there is a
17 separate issue on the demonstratives that we wanted to address.
18 So it's slide 23. We still have a continuing objection which
19 we made during Monday's appearance.

20 It references Dr. Ferrera's, our expert, undated
21 report from 2015. It was actually offered before he was
22 engaged as an expert in this case. It was offered when he was
23 a consultant on behalf of Sony. At that time, he was analyzing
24 the "Let's Get It On" recording by Marvin Gaye and not the
25 sheet music.

1 There's an opinion that they're trying to put on the
2 screen from that report that addresses on the harmonic rhythm
3 in the recording, the Marvin Gaye recording, which Dr. Ferrera
4 has opined is different from the harmonic rhythm in the sheet
5 music.

6 So this slide is both irrelevant and highly
7 prejudicial because it analyzes the Marvin Gaye recording and
8 not the sheet music. So we would ask that the portion of this
9 slide that I've underlined be whited out or deleted because
10 this portion relies on the recording. The first part that I
11 bracketed is okay because it's the same in both the recording
12 and the sheet music.

13 THE COURT: The bracketed part says: "Both songs use
14 a similar (but not identical) chord progression."

15 MR. GOLDSMITH: We're okay with that. The rest we
16 would --

17 THE COURT: And it then proceeds -- and this is the
18 objected-to portion: "In the same harmonic rhythm of two
19 chords per bar in which the second and fourth chords are
20 anticipated, i.e., may occur on the second half of the two."

21 MR. GOLDSMITH: We don't object to that graphic. That
22 graphic is okay. It's just the text.

23 THE COURT: I certainly recognize Dr. Stewart's
24 handiwork.

25 How do you think this part of the testimony affects

1 the jury?

2 MR. FRANK: This particular slide?

3 THE COURT: The ways of expressing the conclusion and
4 the supporting conclusions that he draws.

5 MR. FRANK: I think it doesn't affect the jury because
6 the harmonic rhythm is one of the issues in the case. I don't
7 believe -- correct me if I'm wrong. I'm sure you will.

8 But both experts agree, I think, that harmonic rhythm
9 is expressed -- harmonic rhythm is expressed in the deposit
10 copy. So this is a statement from -- I'm sorry.

11 Dr. Stewart is quoting Dr. Ferrera talking about the
12 harmonic rhythms. If Dr. Ferrera wants to get on the stand and
13 clarify that that's not what he meant -- he was actually
14 specifically talking about sound recording -- he's certainly
15 within his rights to do that.

16 Our position is that the harmonic progression is
17 embodied in the deposit copy, and we are addressing the
18 opinion. The distinction I'm making is that --

19 THE COURT: Your position is that the harmonic is in
20 the deposit copy?

21 MR. FRANK: It is. Yes. It's embodied in the deposit
22 copy. So we believe that it's relevant. That's one of the
23 constituent elements that we believe go with the selection and
24 arrangement argument.

25 MR. GOLDSMITH: If I may respond very briefly to that,

1 please. There is no dispute that there is a harmonic rhythm in
2 the deposit copy. The problem is that the harmonic rhythm in
3 the deposit copy, according to our expert, is different from
4 the harmonic rhythm in the recording.

5 Here, he was analyzing the harmonic rhythm in the
6 recording. So this is just another back-door way to get the
7 recording into the case. Our expert should not have to
8 explain, oh, I was analyzing the recording here when the
9 recording is not part of the case.

10 His opinion is that the harmonic rhythm and the sheet
11 music is totally different from the harmonic rhythm in the
12 recording. So presenting his analysis of the recording is
13 irrelevant and prejudicial.

14 THE COURT: It's been forbidden before.

15 MR. FRANK: We are not presenting the recording.
16 What's been forbidden is putting that recording into evidence
17 or representing that elements of the recording -- that elements
18 of the recording are protected when they're not. I believe
19 what the Court's ruling was that we couldn't represent that
20 they were protected.

21 THE COURT: If there was no recording, there would be
22 no relevance of this exhibit.

23 Is that true? And the statements in it wouldn't even
24 be made.

25 MR. FRANK: I would respectfully object, your Honor.

1 I would respectfully dissent to that because they're
2 representing to you that his opinion is expressly related to
3 the sound recording.

4 I understand what they're representing, but we believe
5 that this opinion also applies to the deposit copy. If they
6 would like their expert to clarify that, they're welcome to do
7 that. The harmonic rhythm is embodied in the deposit copy as
8 well. If this is out of context in some way, that's up to
9 their expert to clarify that.

10 THE COURT: Maybe.

11 MR. FRANK: Maybe.

12 THE COURT: Would you like a voir dire on it when he
13 gets to that point?

14 MS. FARKAS: Your Honor, this is clearly intended to
15 confuse the jury.

16 THE COURT: My question is, however, very clear.

17 Do you want a voir dire of him at the point that he
18 embarks on this explanation?

19 MR. GOLDSMITH: I'm not sure if a voir dire is
20 necessary because all this is is Dr. Stewart's addressing
21 Dr. Ferrera's opinion on the recording. And I can show you the
22 report, where it comes from. And Dr. Ferrera is analyzing the
23 recording. Your point before was very on point.

24 THE COURT: I'm not ordering you to have a voir dire
25 on it. In the middle of a trial, that is a way of handling the

1 defense that you see in what you've got here. And I'm offering
2 you the opportunity. If you don't want it, don't take it. Do
3 it through Dr. Ferrera.

4 MR. GOLDSMITH: The problem, Your Honor, is if it goes
5 in at all, then Dr. Ferrera will be required to address the
6 Marvin Gaye recording, which should never be part of this case.
7 And the point you made before is exactly the right one, which
8 is that if recording did not exist, this analysis that they're
9 trying to put before the jury would not exist.

10 THE COURT: Isn't that what you're going to move to
11 exclude?

12 MS. FARKAS: Voir dire Dr. Stewart when the slide
13 comes up?

14 Is that what you're saying?

15 THE COURT: I've said it eight times.

16 MS. FARKAS: Sure, your Honor. We'll do that.

17 THE COURT: That may help bring some antiseptic in
18 that situation.

19 MR. GOLDSMITH: Just so we're clear, do you want that
20 to be done outside the presence of the jury or in the presence?

21 THE COURT: The point of it is that it's done in the
22 presence of the jury, where you're supposed to be trying the
23 case.

24 MR. GOLDSMITH: Understood, your Honor. Thank you,
25 your Honor.

1 MR. FRANK: Thank you, your Honor.

2 THE COURT: What you're doing is producing subjects
3 for their conversation in the room when they are deciding the
4 case.

5 MR. GOLDSMITH: Understood.

6 MR. FRANK: Thank you, your Honor.

7 MR. CRUMP: Can I briefly say one thing.

8 THE COURT: I don't know. I'm not sure.

9 MR. CRUMP: Your Honor, previously, in my absence, it
10 was brought up about a letter written that I was going to do
11 inappropriate things or say inappropriate things. And
12 yesterday I tried to go and be as respectful to the Court.

13 THE COURT: You certainly were.

14 MR. CRUMP: So I wanted to have it on the record that
15 as a duly qualified licensed attorney, I will always follow the
16 Court's instruction. And I've been hired to be trial counsel
17 by the client, who wanted me to do parts of the case.

18 THE COURT: Sure.

19 MR. CRUMP: I would only ask that our client not be
20 forbidden to have her case tried, and I will follow the Court's
21 direction on that.

22 THE COURT: Don't worry at all. At the end of the
23 pretrial conference, they said that they wanted you to do the
24 final closing argument, and I said no because you would be a
25 stranger, basically a stranger, in the case.

1 So yesterday morning, they put you in to make the
2 opening statement and examine the witness. And I thought that
3 was a rather adroit and absolutely justifiable curing of the
4 gap that I had foreseen at the end of the conference.

5 As far as I'm concerned, you can do whatever you want.
6 You're fully on board.

7 MR. CRUMP: Thank you very much, your Honor.

8 THE COURT: And your behavior, so far, there's been
9 nothing to criticize.

10 MR. CRUMP: Thank you. I just wanted to preface that
11 before you.

12 THE COURT: Feel free to raise -- personal feelings
13 are one more terrible burden when you're busy trying a case,
14 and the lawyer shouldn't have to perform under that burden.
15 Feel clear to bring it up. We're all human beings.

16 MR. CRUMP: Thank you so much, your Honor.

17 MR. FRANK: Thank you, your Honor.

1 (Continued on next page)

2 (In open court; jury present)

3 THE COURT: Good morning. Please be seated.

4 Members of the jury, this is something that occurs
5 from time to time. And the lawyers want a conference with me
6 about some things that are coming up in the case and just
7 really administrative or procedural questions.

8 Frequently they're taken care of during the day by a
9 quick "conference at the side. If it looks like it's going to
10 be longer, we do it in the robing room. This morning was an
11 instance of that.

12 I'm telling you this because I don't want you to be
13 suspecting that we were playing string games or reading the
14 newspaper. We were talking about the administration of the
15 case. And it saves time in the long run for all of us to do it
16 as we go along. That's why you were waiting in the jury room.

17 MR. FRANK: May it please the Court.

18 Ms. Passey, could you put the screen to 13, please.

19 Plaintiffs recall Dr. Alexander Stewart.

20 Your Honor, may we proceed?

21 THE COURT: You may.

22 MR. FRANK: Thank you, your Honor.

23 ALEXANDER STEWART, recalled.

24 DIRECT EXAMINATION

25 (In open court; jury present)

1 THE COURT: Dr. Stewart, you're still under oath.

2 THE WITNESS: Yes, your Honor.

3 BY MR. FRANK:

4 Q. When we left off yesterday, Dr. Stewart, at 5:00, I believe
5 we were at slide 13.

6 Could you explain what's embedded on that slide,
7 please.

8 A. Again, I apologize for some of you who may have musical
9 training. But in my classes, where I teach musical history,
10 there is a wide spectrum of music experienced and knowledge.
11 And it helps put us on the same page in terms of how we use
12 these terms.

13 So this is an important concept in terms of analyzing
14 music for comparison. And I believe that all musicologists who
15 do this kind of use this system. And that's assigning Arabic
16 numerals or these 7 integer, 8 integer to each pitch that
17 enables us to compare melodies across different songs without
18 worrying about what key they're in because all these
19 relationships remain the same, regardless of the key.

20 So probably everybody's familiar with the solfege
21 syllables: "Do-re-mi-fa-so-la-ti-do." This is basically just
22 another way of using numbers: 1, 2, 3, 4, 5, 6, 7, 8.

23 So most of the time, we're going to be using these
24 numerals or integers to describe the melody we're talking
25 about. So if you want to play the example, it's just a simple

1 C major scale. You could do this either the solfege syllables
2 or the numbers to describe these pitches and their relationship
3 within the scale.

4 (Keyboard Played)

5 BY MR. FRANK:

6 Q. Could you speak to scale degrees, Dr. Stewart.

7 What are those?

8 A. What I was getting a moment ago was using these numbers to
9 describe a certain melody. I thought it would be helpful to
10 look a specific melody and see it in terms of its pitch
11 sequence. Here is a very familiar song that uses the pitch
12 1875678165.

13 If you could play the sample, please.

14 (Audio played)

15 BY MR. FRANK:

16 Q. Could you explain for us, Dr. Stewart, what keys are.

17 A. The key is the central organizing pitch that a piece of
18 music would be in. The scale we just heard, a C major scale,
19 the keynote or what we also call the tonic is the first note
20 and the last note of the scale. So the C major scale starts on
21 C and ends on C.

22 It gives kind of a sense of resolution or finality
23 when you reach that pitch. So if you're going up the scale
24 from 1 to 7 and you stop at 7, if I may to the piano for
25 demonstration.

1 Most people will want to hear one more pitch after
2 that. That gives them a sense of resolution. that's because
3 we're ending on the topic or the keynote of the piece. That
4 last piece is called the keynote because it leads us back to
5 the topic or back to the 1. Notice that 1 and 8 are going to
6 be the same sound because they're both expressions of the topic
7 or the pitch class.

8 The deposit copy of "Let's Get It On" is in the key of
9 E flat. And the studio recording of "Thinking Out Loud" is in
10 the key of D. These are two keys that would be as closest
11 together as can be. In western music, they're only a half step
12 apart, E flat and D.

13 We're going to be looking at "Let's Get It On" in the
14 key of D, the same key as "Thinking Out Loud" for comparison.
15 I think the other musicologist did the same thing. It's just a
16 way of comparing them. When you do that, all the musical
17 relationships remain the same. Nothing is changed in terms of
18 the composition.

19 Q. Dr. Stewart, can you tell us what chords are.

20 A. We've been talking about horizontal expression, musical
21 expression, with melodies and scales. We also have vertical
22 considerations which would be musical simultaneities can form
23 harmonies or chords.

24 The most basic form in western music is a triad, and
25 it is composed of the first, third, and fifth note of the

1 scale. Here is a simple C major triad with the root being C.
2 And then you skip a note. You don't play a D, but you have the
3 third, which would be E; and then G, which is the fifth.

4 We can go to the next slide.

5 Q. What happens when you add a seventh in that scenario?

6 A. So you don't have to stop there with the three notes. You
7 can continue stacking up more pitches using the same
8 methodology, skipping a note each time. So after the fifth,
9 you would add a seventh. After the seventh, a ninth, eleventh,
10 thirteenth even.

11 So we're going to be talking about some chords that
12 have 7ths in them. If I may one more time, if you take the
13 basic C major 7.

14 (Keyboard played)

15 THE WITNESS: You could also invert it. Instead of
16 playing it like that, you could put the 7th on the bottom
17 which kind of yields a more interesting sound.

18 (Keyboard played)

19 BY MR. FRANK:

20 Q. Dr. Stewart, within the context of chords, how would you
21 explain what a triad is?

22 A. I think we did that just a moment ago, maybe the next
23 slide. Yes. So the triad is again, three notes comprised of
24 the root, the third, and the fifth. So in this example, I've
25 harmonized a major scale.

1 What's significant here is that we also use numbers in
2 another way to analyze the music. And we use Roman numerals to
3 talk about the harmony. Remember Arabic numerals were for the
4 melodic pitches, the linear or horizontal.

5 For the chords or the vertical sounds, we use Roman
6 numeral to indicate what the root of the chord is. So the
7 chord built on the first degree of the scale uses the I because
8 it's major. So upper case Roman numerals indicate major.
9 Lower case Roman numerals indicate minor.

10 So a harmonized major scale begins with a major triad
11 and then a minor triad. And on 3 -- not in every triad,
12 Notice that the Roman numerals are in lower case because it's
13 minor.

14 And then a 4 chord on the 4th degree of the scale, IV,
15 and V for the chord built on the 5th degree of the scale.
16 We're not going really go beyond that now because the harmonies
17 that we're dealing with in this case are basically the chord
18 built on the first degree of the scale, which would be I, IV,
19 and V. So let's hear the chords though of the harmonized major
20 scale. Those are the three principal chords that we're dealing
21 with.

22 (Audio played)

23 BY MR. FRANK:

24 Q. I think you've indicated, Dr. Stewart, that you've
25 transposed the two songs at issue in this litigation into D

1 major?

2 A. Well, we transposed one of them, the "Let's Get It On,"
3 from E flat to D. "Thinking Out Loud" was in D. So I thought
4 it would be helpful now to look at the pitches in the key of D.
5 It's the same idea, 1 through 8. So here is the scale in the
6 key of D.

7 (Audio played)

8 THE WITNESS: So the pitches in green are the topic or
9 the keynotes, 1 and 8. So 8 is really the same sound as 1.

10 BY MR. FRANK:

11 Q. Dr. Stewart, could you speak to the distinction in major
12 and minor chords.

13 A. Yes. The difference is just in a single pitch. The third
14 degree of the scale or the third in the chord is a half step
15 lower. So in the key of D, D major as an F sharp which is the
16 third note of the triad.

17 And D minor has an F natural. Remember a natural
18 cancels out a sharp or a flat. We also see two ways of
19 representing the harmony here. We have a D above the chord,
20 above the triad.

21 It doesn't have anything following it, no dash or
22 anything. That is understood to be major. The D with the dash
23 after it indicates that it's minor, D minor. We also again
24 have the Roman numerals. The upper case Roman numeral means
25 it's major. The lower case means it's minor. Let's listen to

1 the difference of these triads.

2 (Audio played)

3 BY MR. FRANK:

4 Q. Dr. Stewart, what happens when you take a familiar song and
5 turn it into a minor?

6 A. It's still recognizable. It's going to be the same
7 composition. So in this particular composition, it's still
8 minor. It's still in green. I think everyone would recognize
9 what song it is. It wouldn't be considered that it's a new
10 composition just because it has that one different notes.

11 (Audio played)

12 THE WITNESS: So maybe instead of a happy birthday,
13 it's a sad birthday. But you get the point. It didn't really
14 change it. It's still recognizable, what the song is.

15 BY MR. FRANK:

16 Q. Can you explain what this is, Dr. Stewart.

17 A. Sure. This is from the musicologist for the defense's
18 preliminary report. And he gave the basic harmony of the two
19 songs. And he notes that both songs use a similar but not
20 identical chord progression and the same harmonic rhythm of two
21 chords per bar in which the second and third chords are
22 anticipated. We're going to look closely at this because it's
23 an important point in the songs.

24 Now, he has an error here -- I think's just probably
25 typographical because in other places, he describes the harmony

1 correctly. But he has the second chord of "Let's Get It On" as
2 a two minor chord and we know it's a 3 minor chord. The chord
3 progression, again, is I, uppercase Roman Number, 3, lowercase
4 Roman numeral, 4 uppercase, 5 uppercase. There is one
5 difference in "Thinking Out Loud" that we're going to also look
6 at closely. So I'll come back to that in a minute.

7 He says that it's basically the same or similar
8 harmonic progression or chord progression.

9 Q. What have you done here, Dr. Stewart?

10 A. Yes. So this slide illustrates the rhythm in each song.
11 Let's hear it, and then we're going to look at it a little more
12 closely in detail.

13 (Audio played)

14 THE WITNESS: Now, to me, those sound very, very
15 similar.

16 MS. FARKAS: Objection, your Honor.

17 THE COURT: Sustained.

18 BY MR. FRANK:

19 Q. Go ahead, Dr. Stewart.

20 What was your -- what was your opinion -- go ahead.

21 What were you going to say after that?

22 A. Well, let's listen one more time.

23 (Audio played)

24 BY MR. FRANK:

25 Q. Dr. Stewart, would you be able to describe for the Court

1 how those two chord progressions vary, if at all.

2 A. Yes. Please go to the next slide.

3 So on this slide, I've circled in green the notes that
4 are different between these two chord progressions. So you'll
5 see that one note in the second chord of "Let's Get It On" is
6 different. It's circled. In "Thinking Out Loud," that note is
7 different. It's up a half step to D.

8 In "Let's Get It On," there's also an additional note
9 on the fourth chord which is the 7th. The difference between
10 these two is not really articulated in "Thinking Out Loud"
11 during the first 24 seconds or the first verse of "Thinking Out
12 Loud" because that one pitch on the second chord is not sounded
13 at all.

14 It's only two pitches played on the second chord on
15 the recording, F sharp and A. So it really kind of defines
16 more clearly F sharp minor. You could say that essentially the
17 second chord is the same for those first 24 seconds.

18 So even this very, very small difference between the
19 two doesn't exist during that whole opening section of
20 "Thinking Out Loud."

21 Q. Dr. Stewart, if you would, with respect to the scenario you
22 just spoke to, would you identify and point to the note that
23 you're talking about that doesn't exist in the first 24
24 seconds.

25 A. Sure.

1 Q. Maybe in the next slide?

2 A. Yes. So this note here, the top note, is not present
3 during that whole opening section. So it really sounds -- at
4 that point, it really would just as easily be three, lower case
5 Roman numeral, which would make it the same as "Let's Get It
6 On."

7 Q. Thank you.

8 A. Let's play -- no. We don't need to play this again. I
9 think we've played it several times.

10 Let's go to the next slide.

11 Q. Can you describe harmonic rhythm. You've mentioned it
12 earlier in your testimony.

13 A. So just as melody with a successions of pitches in musical
14 time, chords are also occurring in musical time. So when we
15 talk about harmonic rhythm, we're talking about rhythm that the
16 chords that are played. So it's basically the rate of change
17 of the chords, but it's also where they're placed rhythmically.

18 Q. Could you demonstrate how that plays out with regard to the
19 two songs.

20 A. Sure. I think the next slide give -- yes. So one of the
21 things that makes this progression particularly interesting and
22 aesthetically pleasing is the anticipation of the second and
23 fourth chords in both of these songs.

24 They're anticipated, meaning that they're played
25 slightly ahead of the third beat. They anticipate the third

1 beat. When we heard them in the last example, the chords were
2 squarely on 1 and 3 -- 1, 2, 3, 4; 1, 2, 3, 4. Now we're going
3 to hear the second and fourth chords are anticipated. So it's
4 1, 2, 3, 4; 1, 2, 3, 4. Let's listen to it with this
5 anticipation.

6 (Audio played)

7 THE WITNESS: So I think that really propels the music
8 forward and gives it a lot of rhythmic interest. It's a very
9 significant part of the foundation of both of these songs.

10 BY MR. FRANK:

11 Q. Have you had occasion to analyze the defendants' analysis
12 as it relates to harmonic rhythm?

13 A. Yes, I have.

14 Q. Would that slide depict what the analysis is?

15 A. Yes. So the defendants' musicologist provided this
16 analysis that shows the basic harmony in the deposit copy of
17 "Let's Get It On," which is the top line there. And then he's
18 given five he found in "Thinking Out Loud." "TOL" stands for
19 "Thinking Out Loud."

20 Q. Dr. Stewart, if you could go back for a moment. I think
21 you used the term "deposit copy."

22 Can you explain for the Court again, if you haven't
23 already, what that means and what that is.

24 A. Sure. So when a piece is registered for copyright, a copy
25 has to be submitted to the U.S. Copyright Office as part of the

1 registration process.

2 Q. And you mentioned that one of these that's depicted on the
3 harmonic analysis comes from a deposit copy.

4 Could you clarify one which it is.

5 A. Yes. It's "Let's Get It On." The top one is the deposit
6 copy.

7 Q. Okay. Thank you.

8 If you could continue with your response to the
9 analysis.

10 A. Yes. So the five variations that Dr. Ferrera provided of
11 "Thinking Out Loud" are underneath his depiction of the basic
12 harmony from the deposit copy of "Let's Get It On."

13 I think the next slide will give us the opportunity to
14 hear these.

15 (Audio played)

16 THE WITNESS: Could you wait one second. Go to the
17 next slide, please. Thanks.

18 So on the right, we have the chords realized in terms
19 of the actual pitches. As we go down that sheet on the right,
20 we have "Thinking Out Loud" 1, his first variation, "Thinking
21 Out Loud" 2, 3, 4, 5. And then at the bottom, we have
22 "Thinking Out Loud" again. That's kind of what he did over
23 here.

24 So we'll go down the list and hear these. He
25 identifies "TOL" number 4 and number 5 as being the most

1 similar to "LGIO," or "Let's Get It On."

2 BY MR. FRANK:

3 Q. Do you have audio samples that correlate with this?

4 A. Yes. Let's follow this. On the left, it will be
5 highlighted as each chord progressions is played on the right.

6 (Audio played)

7 A. So that was "Let's Get It On" again at the end. So there
8 are a lot of different variations there, which is something
9 that you would expect. When musicians are playing these chord
10 progressions, they don't play them the same way every time.
11 Generally, a keyboard player would use different variations.

12 MS. FARKAS: Objection. To the extent that
13 Dr. Stewart is talking about "Let's Get It On," let's stick to
14 the deposit copy and not what performers might realize with the
15 deposit copy, please.

16 THE WITNESS: I was not referring to the deposit copy.
17 I was just saying that what was done in "Thinking Out Loud" was
18 a common thing to do in songs.

19 MR. FRANK: Could you go to the next slide, please.

20 THE WITNESS: So here is the deposit copy of "Let's
21 Get It On." The first two pages here are the application with
22 the basic information. Note that the company was -- two
23 different companies, corporations, listed there: Stone Diamond
24 Music Corp. in Hollywood, California, and Cherritown Music, in
25 Fosterdale, New York, which I think Mr. Townsend was having

1 medical treatment at the time. So he used that as his address.
2 Below that, you see his name, Ed Townsend. The date is down
3 below that.

4 The second page has some of the same information. So
5 this is just basically to identify the author and the author's
6 location and the date of registration.

7 The next two pages are the actual deposit copy. This
8 is the music as transcribed, put into music notation, and
9 submitted to the U.S. Copyright Office. So those are the first
10 two pages.

11 The next slide will give pages 3 and 4. And then the
12 fifth page is the last page of the actual music. The sixth
13 page is some notations that I think the U.S. copy right office
14 had made about where it was being put and so forth.

15 BY MR. FRANK:

16 Q. To be clear, this was one of the materials that you
17 reviewed in connection with the opinions you're proffering
18 today. Correct?

19 A. I'm sorry?

20 Q. This was one of the documents of the materials, the deposit
21 copy, that you reviewed in connection with your analysis?

22 A. Yes. I asked for this practically at the inception of my
23 engagement to do this analysis of these two songs.

24 Q. Do you have samples of the deposit copy?

25 A. Sorry?

1 Q. Do you have audio samples of the deposit copy depicted
2 there?

3 A. Yes. So what I've done here is taken the deposit copy
4 music notation and put it in Sibelius, which is a music
5 notation software. With that software, you can also play back.
6 It gives you the example as a MIDI file, which is a musical
7 instrument digital interface. Basically, it will then sound
8 out the notes that you put into Sibelius. So that gives us the
9 ability to hear this next phrase.

10 What I've done here -- this is kind of an important
11 point -- is to show that if you take the note values and cut
12 them in half, but you also cut the tempo in half. There is no
13 change to the way it sounds. It sounds absolutely identical to
14 what you hear each time. And I think this slide will
15 illustrate that dramatically.

16 (Audio played)

17 THE WITNESS: That sounds the same because it was the
18 same example. Let's play the second one.

19 (Audio played)

20 THE WITNESS: Could we try that one more time, one
21 followed by two.

22 (Audio played)

23 THE WITNESS: So you may not remember that the tempo
24 is indicated by the BPM or beats per minute. So in the upper
25 left corner of each of those examples, you have a quarter note

1 equal to 164. If you take that tempo and cut it in half to 82,
2 the tempo is half as fast. If you do the same thing with the
3 rhythms, it sounds exactly the same.

4 Q. You've had occasion to review professional reports that
5 were proffered by the defendants in this case, were you not?

6 A. Yes.

7 Q. Was an opinion or a position espoused as it relates to
8 harmonic rhythm by the defendants?

9 A. Well, the defendants' musicologist has put a lot of weight
10 on the fact that these were notated differently. So in the
11 deposit copy, he's made a big deal that it's four measures
12 long, in his reports, in the deposit copy but only two measures
13 long in "Thinking Out Loud."

14 But I think the slide we just saw dramatically
15 illustrates that there is no difference in the sound. In fact,
16 he even acknowledges here in the last part of his statement
17 from his report: "Only if one cuts in half the value of the
18 notes in the chords of "LGIO" is the harmonic rhythm between
19 these chord progressions the same."

20 Well, in other words, it's just a notational kind of
21 contrivance. It's not any difference in the actual musical
22 sound. So I think he's trying to manufacture a difference here
23 that doesn't really exist in terms of the music.

24 MS. FARKAS: I would just note an objection that I
25 don't think there is any dispute that the deposit copy does not

1 contain a tempo. So Dr. Stewart's opining on what the deposit
2 copy sounds like with him just choosing tempos that he wishes
3 to choose is not a reflection of what is actually in the
4 deposit copy.

5 MR. FRANK: Thank you. We'll move on.

6 Q. Dr. Stewart, could we move to the next.

7 THE COURT: You can bring that out on cross.

8 MR. FRANK: Thank you, your Honor.

9 Q. Dr. Stuart, you provided -- can you identify first what's
10 embodied in this slide.

11 A. Sure. So just carrying on with what we were just talking
12 about, Dr. Ferrera seems to imply that there are six chords in
13 "Let's Get It On" because he says -- If we could go back one
14 slide. Yes. So he says here: "There are two chords in bar 1;
15 1 chord in bar 2; 2 chords in bar 3; and one chord in bar 4."

16 So that's kind of implying, or more than that even,
17 that there are actually six chords.

18 Q. How many chords are there in "Let's Get It On"?

19 A. There are four. We'll go back to the deposit copy and see
20 that clearly in a moment. So we'll look at the deposit copy in
21 just a second.

22 When the four chords in "Let's Get It On" are notated
23 as a two-measure progression, as they are in both of our
24 transcriptions, the chords fall in between the second and third
25 beats exactly the same way in both songs.

1 The internal relationships of the chords remains the
2 same. The rhythm and duration of the chords remains the same,
3 even when we do this procedure of cutting the tempo in half and
4 cutting the values in half.

5 It's really like the same thing as putting the two
6 songs in the same key for comparison. We would do the same
7 procedure with the rhythms, if we're going to compare them.
8 That's exactly what he did, as well as I, in most of his
9 analysis.

10 Let's go to the next slide.

11 So we go back to the deposit copy here. I circle -- I
12 put in green the first four chords of "Let's Get It On" in the
13 key of E flat. It's E flat, G minor, A flat, B flat. And then
14 just to distinguish them, the next four chords, in blue: E
15 flat, G minor, A flat, B flat 7. Then they have four chords
16 again and so on.

17 So I think it's very clear that there are just four
18 chords. And the way they're placed here in the measures --
19 remember the measures are delineating the time. It's clear
20 that the second chord is anticipated because it comes earlier.

21 It's not after the bar line. The same with the fourth
22 chord. So we have the same harmonic rhythm, four chords with
23 the second and fourth chords being anticipated. The basic
24 analysis, once again, is: I iii IV and V with a 7th added.
25 That's all indicated precisely in this deposit copy.

1 We could I think go to the next slide.

2 MR. FRANK: If you would, Dr. Stewart, for the purpose
3 of the Court's edification, could you just kind of explain the
4 methodology about how you created these particular graphs.

5 THE WITNESS: So this represents graphically the
6 harmonic rhythm and makes it kind of easier for anyone who
7 doesn't read music. And, again, it's really illustrating the
8 point I was talking about with the tempo doubled and the note
9 values doubled. It's still the same thing.

10 So if we count at the slower tempo, 1, 2, 3, 4, and at
11 the double tempo, 1, 2, 3, 4. And if I clap the harmonic
12 rhythm in each case, it doesn't change what I'm clapping. So
13 1, 2, 3, 4, 1, 2, 3, 4, 1, 2, 3, 4, 1, 2, 3, 4, 1, 2, 3, 4. So
14 nothing is changed. It's just purely a notational kind of
15 contrivance. And the music could be notated in different ways,
16 and it would still sound the same.

17 Q. Dr. Stewart, could you explain the term musical
18 "architecture."

19 What is that?

20 A. There was one other little detail in that slide.

21 Q. Please go back.

22 A. The reason there are two here is because notice that the
23 second chord I put F sharp minor, the same in both songs,
24 because, as I mentioned before, that one additional note that
25 you hear in the basic chord progressions of "Thinking Out Loud"

1 is not heard during that whole first part of the verse, which
2 actually we're going to be calling verse 1A. So if we go to
3 the musical structure, we can talk about that.

4 Q. Before you go to the musical structure, could we go back to
5 the slide.

6 Could you point out for the Court that additional
7 note.

8 Do you have a pointer available to you?

9 A. This is not music notation. Here you see that there is a D
10 major chord with F sharp in the bass.

11 Q. And that appears when in the "Thinking Out Loud"?

12 A. It happens in much of the song but not at the beginning;
13 and here that note, that additional note, D, is not present.

14 Q. Thank you.

15 A. It's a small detail, but it changes the harmonic analysis
16 and makes them really the same for that whole opening section.

17 Q. So I think you were speaking to what musical architecture
18 is.

19 A. Yes. So most musical compositions are built from sections
20 that repeat. Repetition is a very powerful tool in music.

21 Very few pieces, especially in popular music, would be what we
22 call through composed, meaning that the music is constantly
23 changing. In fact, that would be kind of difficult for most
24 listeners to comprehend, if it was always changing. So
25 repeating sections is the standard way that music is

1 structured.

2 An example would be the very simple, common structure
3 of verse, chorus, verse, chorus, verse, chorus. It's also
4 called strophic. So an example would be like the "Battle Hymn
5 of the Republic", "mine eyes have seen the glory of the coming
6 of the Lord." That's the first verse. And then "glory, glory
7 hallelujah" is the chorus that everybody knows or the refrain.
8 The next verse is "I've seen him in the watch fires of a
9 hundred circling camps," and I don't remember the rest of it.

10 Most of the people -- people would be most familiar
11 with the refrain or the chorus. That's the part usually where
12 everybody joins in. The verse might be a solo singer. The
13 verse kind of advances a narrative because the lyrics change
14 each time while the melody stays the same in the verse. But in
15 the chorus, we return to the same lyrics each time and melody.
16 So this is generally the kind of most memorable part of the
17 song.

18 In the popular music industry, it's also called the
19 hook. It's considered the most valuable part of the song
20 because it's the most memorable. It's kind of gospel in the
21 popular music industry that a song has to have at least one
22 very memorable hook.

23 Very often the title of the song is also directly
24 referenced during the chorus. So it kind of connects to the
25 overall theme of the piece of music.

1 Q. Dr. Stewart, you've identified verse and chorus, which I
2 think is fairly evident. But you've identified some other
3 components of the musical architecture: Pre-choruses, bridges,
4 interludes, and outros.

5 What are those?

6 A. Yes. So popular music and other forms, genres as well,
7 often have other sections besides just the verse and the chorus
8 of the strophic form. And common sections are intros,
9 introductions.

10 The pre-choruses, which would typically come between
11 the verse and the chorus; bridges, which often just happen
12 once, maybe twice. But they kind of take the music in a
13 different direction for a minute before going back.

14 Interludes, which are sections where maybe the vocal
15 drops out and there's an instrumental part. And then outros,
16 which would be the ending. So those are the common kind of
17 structural forms that you find in popular music, especially
18 today.

19 Q. As it relates to bridges, to your knowledge, Dr. Stewart,
20 do they serve a particular function within the context of the
21 musical architecture?

22 A. Well, they take the music to a different place. Yeah.

23 MR. FRANK: Okay. If we could proceed to the next
24 slide.

25 THE WITNESS: No.

1 MR. FRANK: You're not done yet. I apologize.

2 THE WITNESS: I thought you would ask me.

3 The next slide will provide a roadmap, if you will, of
4 the form or structure of each song according to the defendants'
5 musicologist -- and I don't have any problem with accepting his
6 analysis of the form.

7 I think it's easier to just use that. Different
8 analysts may call different sections by slightly different
9 names sometimes because this is an analytical decision, what to
10 call something. Sometimes they might choose something a little
11 different from one another. But I'm fine with his roadmap. So
12 if we, in a moment, turn to the next slide, we can look at
13 these, the form or structure of each of these songs. And --
14 Q. Dr. Stewart, I apologize. I'm going to jump back on you
15 for one moment.

16 The last line, it seems to me you're suggesting your
17 opinion is that the common elements between the two songs at
18 issue in this litigation are contained in the verses of the
19 songs, the choruses, and the interlude?

20 A. That's correct. So it's important to understand these
21 structures as we proceed because where we're going to hear the
22 most similarities, according to my analysis, are in the verses
23 of "Thinking Out Loud," the choruses of "Thinking Out Loud,"
24 and the interlude.

25 Q. Would you like to proceed to the next slide, Doctor.

1 A. So here is the analysis of form from the defendants'
2 musicologist. And you'll see that he has for "Let's Get It On"
3 a verse 1 which lasts 16 measures of bars; chorus 1; verse 2;
4 verse 3; bridge 1; verse 4; chorus 2; bridge 2, and then outro.

5 I've add the times on the left side to coincide with
6 also a computer-generated recording of the deposit copy that
7 the defense generated. so those times conform to this
8 computer-generated or AI-generated recording of the deposit
9 copy.

10 And then on the right is the form of "Thinking Out
11 Loud." Notice that there is a verse 1A and 1B, a pre-chorus 1,
12 a chorus 1, verse 2A and 2B, pre-chorus 2, chorus 2, interlude
13 that also contains a guitar solo, and then, finally, chorus 3.
14 Those are all his analysis and his timings.

15 Q. To be clear, Dr. Stewart, when you say "AI generated," can
16 you describe what that is.

17 A. Like I said, that refers to artificial intelligence. I'm
18 not really familiar with what software they used to produce
19 this because it's something different than I've ever heard
20 before. We'll hear it in a moment.

21 Q. You've brought or you have the defendants' audio file as
22 part of your presentation?

23 A. Yes. The next slide will take us through the form using
24 their audio file that they produced, and it will -- as each
25 section of the piece goes by or begins, it gives a timing and

1 the name of what that is in the form.

2 In other words, you'll hear verse 1. It will say 0
3 seconds; 24 seconds, chorus 1, and forth as we go through the
4 form. So it's important to we get a handle on these different
5 sections of each song, and this will help us to I think begin
6 to do that.

7 Q. So what we're about to hear is the AI-generated version of
8 "Let's Get It On"?

9 A. Yes. I'm not sure if that's the accurate way to describe
10 this, because I'm not really sure how this was done, but it was
11 computer-generated somehow. It was not human beings in a live
12 performance.

13 MR. FRANK: I understand. Could we hear that audio
14 recording.

15 (Audio played)

16 (Continued on next page)

17

18

19

20

21

22

23

24

25

1 BY MR. FRANK:

2 Q. Dr. Stewart, did that sound particularly soulful to you?

3 MS. FARKAS: Objection.

4 MR. FRANK: I'll withdraw the question.

5 Q. Dr. Stewart, did you have occasion to put the depict -- or
6 create a depiction of the chords created by the defendants in
7 making that AI-generated audio file?

8 MS. FARKAS: Objection, mischaracterizes the evidence.

9 Q. Could you explain --

10 I'm sorry, go ahead.

11 A. Well, the thing that bothered --

12 Q. Could you explain what you have done with respect to slide
13 45?

14 A. Yes. So here is the harmony or the realization of the
15 Deposit Copy in the key of D -- what we just heard was in E
16 flat -- that the chords that were used in that -- first, I
17 should point out that, like in *Thinking Out Loud*, both songs
18 use the same chords for the chorus and for the verse. So you
19 here these progressions over and over in both songs throughout
20 that entire rendition of the Deposit Copy. You heard the
21 chords in root position, meaning that the root of the chord was
22 on the bottom on each chord.

23 And this is something that really kind of bugs me as a
24 musician because it just does not sound very pleasing,
25 especially after four minutes of hearing this. What's

1 particularly jarring is this movement from the third chord to
2 the fourth chord, so...

3 (Keyboard played)

4 So it moves from this chord, and there is this big
5 kind of -- there is a jump from the fourth chord.

6 (Keyboard played)

7 That is not smooth. Most musicians when they play a
8 chord progression would attempt to have smoother voice leading,
9 and I'm not sure why in this example we just heard that choice
10 was made. But it's really degrading to me as a musician to
11 hear it played that way, with that jump.

12 (Keyboard played)

13 When it could have been more easily played as...

14 (Keyboard played)

15 So let's listen to these two examples. And I'm not
16 going to speculate as to why it was done that way. Either
17 maybe a musician didn't create or program the software to
18 create that, but...

19 MS. FARKAS: Couple of objections here.

20 First of all, this witness should not be speculating.

21 Second of all, not to mention that his speculation on
22 this fourth chord, which contradicts his prior testimony in his
23 own slide 17. He's the one who transcribed in A7 the exact way
24 it is being played. And if is he going to complain about it
25 now, I guess I'll deal with it on cross.

1 MR. FRANK: Are you withdrawing your objection?

2 MS. FARKAS: No.

3 BY MR. FRANK:

4 Q. Dr. Stewart, if you can proceed.

5 A. Well, what I'm saying is that is what's on the recording we
6 just heard, those are the chords and the way they were
7 expressed -- let's listen to it.

8 To me, what I have transcribed here sounds exactly
9 like what we just heard for practically four minutes straight.

10 Example one, please.

11 (Audio played)

12 Like I say -- wait, not yet. So this next example is
13 how it should be played with smoother voice leading, and it's
14 all the same pitches, not one different pitch. But they are
15 ordered differently in a way that creates better voice leading,
16 creates a smoother transition from chord to chord.

17 MS. FARKAS: I'm sorry.

18 A. So every note here --

19 MR. FRANK: Let her object. She had an objection.

20 MS. FARKAS: So I'm going to object to any other
21 variations from the Deposit Copy and the witness's speculation
22 as to how it might otherwise have been played. We have the
23 Deposit Copy in front of us, and that's the only work that is
24 at issue.

25 MR. FRANK: We'll move on.

1 THE COURT: Overruled.

2 MR. FRANK: I'm sorry. I apologize, your Honor.

3 Q. Then proceed, Dr. Stewart.

4 What was your point?

5 A. I was just going to say that the person who programmed the
6 computer to play that version we just heard made choices about
7 how to express these chords, and I don't think it was done in a
8 way that any competent musician would do it.

9 If we listen to the next example, it shows the way
10 that a competent musician would express this. Again, there is
11 not one note here that is not in the Deposit Copy. It's
12 exactly conformed --

13 MS. FARKAS: Your Honor.

14 A. -- conforms to the Deposit Copy.

15 MS. FARKAS: He is opining as to how musicians might
16 perform the Deposit Copy. That is irrelevant and not at issue
17 in this case.

18 What is at issue in this case is what is expressed in
19 the Deposit Copy, not how some or many different performers
20 might perform it in different ways.

21 MR. FRANK: Respectfully what Dr. Stewart is
22 responding to are the choices that were made in utilizing the
23 AI program. This isn't about personal choices of musicians and
24 live performances. He is responding that specific things were
25 done with the AI recording for the defendants that make it more

1 dissonant and less appealing to the ear, shall we say.

2 They conform -- his proposed samples conform with the
3 Deposit Copy. He is just saying that he has concerns about
4 what was -- what the AI depicts.

5 MS. FARKAS: It lacks any foundation. This witness
6 has no idea what choices were made when this audio file was
7 created. It's created based on how it is depicted in the
8 Deposit Copy. If he has a problem with that and wants to
9 change the Deposit Copy, I think that raises a bigger issue.

10 MR. FRANK: The transcription is there is a
11 foundation, there's a transcription and an audio recording that
12 depicts the choices that were made creating the AI file.

13 MS. FARKAS: And you stipulated to it. They
14 stipulated to this exhibit. They stipulated to how it was, how
15 it sounded.

16 MR. FRANK: We did.

17 MS. FARKAS: Yes, you did.

18 MR. FRANK: That's why we are addressing it within the
19 context of this slide.

20 THE COURT: Any objection is overruled.

21 BY MR. FRANK:

22 Q. Dr. Stewart, what were you saying?

23 A. Well, I think we should just hear these.

24 So let's hear the first one again and then the second.

25 (Audio played)

1 Q. Are you ready to proceed to the next slide?

2 A. Yes.

3 Q. Presumably this is the audio file for the commercial
4 recording of *Thinking Out Loud*?

5 A. Yes, it is. And like what we just heard with the *Let's Get*
6 *It On*, this will give captions that give the timing of each
7 section, as well as the name that Dr. Ferrara has assigned to
8 each of these sections. First 1A, 1B, pre-chorus, chorus, etc.

9 Q. Would you like for the file to be played now?

10 A. Please.

11 (Audio played)

12 This is 1B.

13 2B.

14 Q. Dr. Stewart, before you go forward, I believe you testified
15 earlier as to the musical phenomenon of a hook.

16 Do you recall that?

17 A. Of a what?

18 Q. A hook.

19 A. Yeah.

20 Q. Can you identify the musical hook in the song?

21 You just heard where it is.

22 A. The chorus.

23 Q. The chorus. Thank you.

24 Attendant to your analysis, Dr. Stewart, did you have
25 occasion to come to the opinion about a lot of similarities

1 between the two songs?

2 A. Yes, I have. I have identified three principal melodic
3 similarities, and one is in the verse of *Thinking Out Loud*, one
4 is in the chorus of *Thinking Out Loud*, and the third is in the
5 interlude.

6 So we will begin with the verse. The opening phrase
7 of *Let's Get It On*, "I've been really trying baby," "When your
8 legs don't work like they used to before," and then the
9 following three phrases after that.

10 Let's listen to the recording on the right.

11 (Audio played)

12 And the one below.

13 (Audio played)

14 OK. And the transcription there gives the pitches and
15 note that, since this is during verse 1A, the chords are really
16 identical as well. So this melody is happening over the same
17 chords, the same harmonic rhythm. Phrasing is very similar,
18 the placement of the phrases begins after the second beat in
19 both of them.

20 And if we could go to the next slide.

21 MS. FARKAS: So I just want to point out for the
22 record, we received a new set of these slides last night around
23 midnight, and I would just ask the witness that to the extent
24 that any of these melody transcriptions or analyses, slides
25 have been altered since the ones that we received before

1 midnight last night, I would ask that you point out what has
2 been changed.

3 THE WITNESS: Sure.

4 Do you want me to address that on the last slide?

5 MS. FARKAS: My understanding, my guess is that
6 nothing has changed on this, the last slide, which is why I
7 didn't stand up then.

8 But I don't know what's going on from this point
9 forward. If something changed, yes. Please do.

10 A. Well, on this slide, it's exactly the same. Nothing has
11 changed.

12 What I've done here is, you know, visually they look a
13 little different at times, and there is this flurry of notes at
14 the end, near the end of the phrase here, all on the syllable
15 try. So that is stretched out for all of the different notes
16 in the Deposit Copy.

17 My point here is that that's a vowel sound I, and so
18 it's not clearly articulated like if it were a consonant that
19 was changing on each one of these pitches. And we have some --
20 at the end here, we have three very -- four very rapid notes.
21 This first note here is 30-second note. And at this tempo,
22 that is about 7.5 hundredths of a second, each of those notes.
23 The next notes after that are about 1,500ths, hundredths of a
24 second on each of the notes.

25 So if you imagine a singer trying to articulate

1 distinct notes that are that short of duration, and they are
2 not being articulated with any kind of change of consonant or
3 anything, it's really going to be inaudible. Try singing try.
4 I mean, to articulate the same note --

5 Oops, I didn't mean to go forward.

6 Could you go back, please?

7 So these are three notes in a row, Es, on that same
8 vowel sound happening at that incredibly rapid pace. I submit
9 that I can't really hear them in any of these versions.

10 So let's begin with the Deposit Copy recording that
11 the defendants produced up in the upper right that is their
12 recording. And see, I'll point at those pitches, those notes,
13 when we get there. But I can't hear them, and so they are
14 there visually.

15 But, well, let's listen.

16 (Audio played)

17 And then if we could hear my --

18 MS. FARKAS: I have an objection to this, your Honor.
19 Your Honor has already ruled that omissions or additions or
20 errors in transcriptions that are not faithful to what is
21 actually in the Deposit Copy are inadmissible.

22 We can also cite to several decisions one from the
23 Second Circuit and another from other courts across the country
24 that have found that manipulations to the actual copyrighted
25 work are not admissible. So, you know, it's one thing to put

1 in transcriptions that manipulate and omit notes and pitches
2 and change what is actually expressed in the Deposit Copy,
3 which your Honor has already found is inadmissible.

4 And it also makes it even worse to then play
5 audio-recorded performances for the jury that reflect those
6 alterations. We should be sticking to what is in the Deposit
7 Copy.

8 MR. FRANK: Respectfully, I think that this does --

9 MS. FARKAS: Can you let the judge ...

10 MS. RICE: He gets to respond.

11 MR. FRANK: Respectfully, I believe that this does
12 conform with the Deposit Copy. I think the simple point that
13 Dr. Stewart was trying to make was that these notes are not
14 perceivable, and he is suggesting that because they are being
15 sung in a string in the nature of the syllable being sung, they
16 are not distinguishable from the rest of the musical notation.
17 He hasn't changed anything or altered the Deposit Copy. It
18 conforms with what is in the Deposit Copy.

19 MS. FARKAS: There is only one Deposit Copy and, of
20 course, he has changed it. He has deleted two notes from the
21 bottom one. He has moved lyrics over. He has changed rhythmic
22 durations. This is a manipulation of the Deposit Copy. The
23 top one is the Deposit Copy.

24 Why are we talking about anything else? What
25 Dr. Stewart perceives is irrelevant.

1 MR. FRANK: Dr. Stewart has disclosed that the top is
2 the Deposit Copy. He is trying to explain the concept of
3 imperceivable notes in the interplay, the different notes which
4 notes are more important than others based on their similarity
5 and closeness in time as they are expressed.

6 THE COURT: I think the best thing to do is have
7 lunch.

8 We'll resume at 2:15. We can carry on with this.
9 You've heard the flavor of the argument. That's all you need.

10 MR. FRANK: Thank you, your Honor.

11 (Continued on next page)
12
13
14
15
16
17
18
19
20
21
22
23
24
25

1 (Jury not present)

2 THE COURT: What I would like from the defendant, in
3 support of the objection, is a short written statement of the
4 changes that you perceive being made from the Deposit Copy.
5 That's point one. And the significance of the changes of each
6 change, that's point two.

7 Try to get them to my chambers by 1:30 so that
8 Mr. Frank can respond to each of them by 2:00.

9 MR. FRANK: Thank you, your Honor.

10 THE COURT: I assume that's workable. It's a narrow
11 point.

12 MR. FRANK: Very workable, your Honor.

13 THE COURT: And that will allow me presumably to rule
14 by 2:15.

15 MR. FRANK: Thank you, your Honor.

16 MS. FARKAS: Yes, your Honor.

17 (Luncheon recess)

18

19

20

21

22

23

24

25

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

AFTERNOON SESSION

2:15 p.m.

(Jury not present)

THE COURT: I was told I was hard to hear in the back of the room. I just started to do this and forgot all about it. But this is working well?

OK. Thank you. My apologies. The upshot --

Excuse me, Mr. Frank. I don't mean to interrupt.

The upshot is that Exhibits 49,50 -- I'm sorry. 49 is not excluded.

Exhibits 48, 50, and 51 are excluded.

MR. FRANK: Yes, your Honor. Thank you.

Your Honor, I'm told we're working on an IT glitch right now.

THE COURT: I understand.

MR. FRANK: Thank you.

(Continued on next page)

1 (Jury present)

2 THE COURT: That matter has been taken care of. Now
3 we're trying to take care of the electronic system.

4 (Pause)

5 If Dr. Stewart is still around, he should take the
6 stand.

7 MR. FRANK: Dr. Stewart. We're still waiting.

8 THE COURT: It's fixed.

9 THE DEPUTY CLERK: They are fixing something else.

10 THE COURT: Something else. Are you getting a picture
11 on your screens? No. It's black.

12 Do we need it, or can we proceed with the testimony?

13 MR. FRANK: I think, your Honor, we probably need the
14 visual aids because they depict the Deposit Copy and the
15 analysis Dr. Stewart has done as well as the audio samples.

16 THE JURY: We can see now.

17 MS. PASSEY: Counsel's table just aren't working. I
18 guess we can move forward.

19 MR. FRANK: Some of the screens look like they are
20 intermittently working.

21 MS. PASSEY: That's different. That's not the
22 court's, that's mine. That is why that is working.

23 MR. FRANK: Kim, if you could start us off at slide
24 49.

25 May it please the court. May we proceed, your Honor?

1 May we proceed, your Honor?

2 THE COURT: Are you asking are we in session now?

3 MR. FRANK: Yes, your Honor.

4 THE COURT: Yes, we are. We're awaiting your next
5 question.

6 MR. FRANK: Thank you very much, your Honor.

7 BY MR. FRANK:

8 Q. Dr. Stewart, with respect to slide No. 49, could you
9 identify what you've done here and your analysis.

10 A. Yes. I've put up the pitch sequences, you remember, back
11 when we were talking about those a while back. They indicate
12 the pitch order in each of these examples, and this is the
13 opening phrase of *Let's Get It On*, as well as the first phrase
14 of *Thinking Out Loud*, verse 1A.

15 The pitch sequences are there on the bottom and the
16 notes in red are the same. They coincide with notes in
17 *Thinking Out Loud*. This also gives us an indication of the
18 melodic contour. Basically *Let's Get It On* goes up and down,
19 up down, up down, up.

20 The contour in *Thinking Out Loud* is very similar.
21 It's up down up down up, so it has one fewer up down.

22 Q. Do you have audio samples for all these samples for these
23 particular sequences?

24 A. Yes, I believe so. If you want to play the first one.

25 (Audio played)

1 And the second.

2 (Audio played)

3 So the phrases begin on practically the same place in
4 the measure after the second beat. You can see that the
5 pitches in red are the same. Not all the pitches are the same,
6 and their main difference is that *Thinking Out Loud* goes up to
7 six, whereas *Let's Get It On* has two instances of four.

8 Those instances of four are what are called passing
9 tones, a way of getting from three to five, and then the six,
10 which is the note above five is in music theory called a
11 neighbor tone.

12 So the basic gesture is 3532231 with the difference in
13 the passing tones between three and four -- I mean, between
14 three and five -- and the neighbor tone between the two
15 instances of five.

16 Remember that these are happening over the same
17 harmonic progression, the same chords. So the context is
18 exactly the same with the harmonic rhythm and the chords during
19 this early 24 seconds of *Thinking Out Loud* are virtually
20 identical because that one note that was different in the
21 chords is not present.

22 Q. And for purposes of clarification, Dr. Stewart, with
23 respect to the numerals at the bottom of the slide, you have a
24 two two in parentheses. What is that intended to depict?

25 A. That is indicating that those are the slurs that I was

1 talking about before on the vowel sound. The notes are not
2 articulated with any kind of clarity, especially, I mean, they
3 are incredibly brief. The 30-second note is about 7.5
4 hundredths of a second at this tempo. And the 16th notes are
5 about 1.5 hundredth of a second.

6 But most importantly, they are just on a vowel sound
7 so there is no way to really hear. There's much more than kind
8 of a bravado in the voice.

9 Q. Do you have any other additional analysis attached to this
10 particular slide?

11 A. No.

12 Q. Could we skip to, I believe, slide 62.

13 Could you explain for us what a blue note or a toneme
14 is, Dr. Stewart?

15 A. Yes. Both songs employ an occasional blue third. This is
16 the third degree of the scale.

17 And I already talked about the major and minor chords
18 and how the third is determinative of a major or minor. But in
19 African-American music, an important characteristic of much of
20 it is the blue third. This can be the third degree of the
21 scale, which can be major or minor or anywhere in between, and
22 music theorists regard it as still the same toneme or the same
23 pitch. The corollary would be, in linguistics, a phoneme is a
24 sound that changes the meaning of a word. And so it is
25 considered that the blue third is still a third no matter how

1 it is articulated within that spectrum of major to minor. It's
2 not changing it from being a third.

3 Now, in this instance in this song, there is no
4 suggestion of either song being in a minor key. They are in a
5 major key. So this third is entirely -- it's not anything that
6 changes the composition to express it either as a blue third or
7 a major third or a minor third. That would remain the same
8 composition regardless.

9 Q. Do you have --

10 A. I'm sorry.

11 THE COURT: Can a single note be either major or
12 minor, or does it require being part of a chord to be major or
13 a minor?

14 THE WITNESS: It does not require being part of a
15 chord.

16 THE COURT: Excuse me?

17 THE WITNESS: It does not require being part of a
18 chord. In this instance when we're talking about the blue
19 third, it's the third degree of the scale using the Arabic
20 numbers.

21 THE COURT: And it is a single note?

22 THE WITNESS: Yes.

23 THE COURT: One pitch.

24 THE WITNESS: One pitch.

25 But no matter how the tuning is, it's still considered

1 the third degree of the scale.

2 THE COURT: Well, I know you made that point, which is
3 not part of my question.

4 THE WITNESS: I'm sorry.

5 THE COURT: Your answer is a single note can be major
6 or minor?

7 THE WITNESS: No. I'm only talking about the third
8 note of the scale, so that's the only one that can be either
9 major or minor or somewhere in between.

10 THE COURT: Putting it the other way, the third note
11 of the scale can be either major or minor?

12 THE WITNESS: Yes.

13 THE COURT: Even though another single note that large
14 cannot be?

15 THE WITNESS: Well, if you change one of the other,
16 like the sixth, for example, if you make that a flat six, that
17 would be considered not the same toneme. That would need to be
18 indicated as a flat six.

19 So it's really the third and sometimes the seventh,
20 and this has to do with blues and African-American music more
21 generally, that because these pitches had this quality really
22 going back historically, you know, over 100 years in the blues
23 and other African-American idioms. The scholars realized that
24 it was really still always a third.

25 However, if you change one of the other pitches, like

1 the fifth, and raised it, or the fourth and raised it, you
2 would have to note that analytically as a sharp four or a sharp
3 five or a two. If you lowered it, it would be a flat two. So
4 that would require indicating it as a distinct pitch, distinct
5 toneme.

6 THE COURT: Is that particularly true of a stringed
7 instrument, or is it equally true of a piano?

8 THE WITNESS: Well, a piano can't really play notes in
9 between a major and minor third. So a stringed instrument
10 could play any variation of the pitch, absolutely.

11 THE COURT: Thank you.

12 MR. FRANK: Thank you, your Honor.

13 BY MR. FRANK:

14 Q. Dr. Stewart, could you speak to the concept of the blue
15 note or the toneme within the context of the melodic
16 similarities of the opening melodies?

17 Could we go to the next slide.

18 MS. PASSEY: Audio is out.

19 MR. FRANK: Audio is out again?

20 MS. PASSEY: No.

21 Q. There we go.

22 A. So, yes, in both songs, they begin on the major third, and
23 Marvin Gaye's vocal as it descends goes into the blue third.
24 You can see the natural sign in front of the note.

25 And what I've done here is show how if you made the

1 *Thinking Out Loud* vocal without changing the toneme, it is
2 still three. But you lower it so it is more bluesy sounding,
3 you have this similarity that is quite apparent, that you've
4 made *Thinking Out Loud* a little grittier, a little more bluesy
5 sounding.

6 So we can just compare it by listening to each of
7 these examples.

8 Q. If you can play the audio.

9 THE COURT: I would prefer that you not refer to
10 Marvin Gaye vocal, if I understand what you mean by that
11 reference.

12 THE WITNESS: Sorry. Yeah, I understand.

13 THE COURT: I don't want any more of it.

14 THE WITNESS: Yes, sir.

15 (Audio played)

16 A. So the difference is subtle, but it's made it a little
17 bluesier sounding.

18 MS. FARKAS: I just want to note an objection to the
19 record that that is not *Thinking Out Loud*.

20 BY MS. FARKAS:

21 Q. Dr. Stewart, what is your analysis with regard to the
22 melodic similarities of the opening melody?

23 A. Well, the pitch sequence would remain the same by changing
24 this toneme. I mean by changing this pitch, it is still
25 considered three. So you've not changed the toneme and the

1 analysis of the pitch sequence would not change by making this
2 note a blue note.

3 So this next slide is just showing, comparing the
4 Deposit Copy of *Let's Get It On*, that first phrase, with the
5 entire verse 1A with the blue third.

6 MS. FARKAS: Before you play the audio, I'm going to
7 just reiterate my objection that they are playing audio that
8 does not accurately represent the two works at issue by his own
9 admission.

10 I would prefer that we stick to the actual works that
11 are at issue.

12 MR. FRANK: In the same way that Dr. Stewart utilized
13 the transposition into the same key, he is illustrating the
14 modalities he used to engage in this particular analysis.

15 MS. FARKAS: If my adversary is suggesting that
16 transposing into the same key is the same as changing the notes
17 of a melody, then we might have a bigger problem here, but I'll
18 keep it simple. That is not the melody of *Thinking Out Loud* by
19 Dr. Stewart's own testimony.

20 MR. FRANK: Dr. Stewart is not suggesting that the
21 notes have been changed. He's suggesting that they are being
22 utilized as a blue third, which is the same note. That is the
23 point, that they are the same note.

24 MS. FARKAS: Well, I believe that if I asked
25 Dr. Stewart if there is a blue note in that portion of *Thinking*

1 *Out Loud*, and I would assume he would say there is not.

2 THE COURT: Why don't you ask him.

3 MS. FARKAS: Dr. Stewart, in *Thinking Out Loud* as it
4 actually exists, is there a blue third over the lyric work?

5 THE WITNESS: Yes.

6 MS. FARKAS: I'm not talking about in this document.
7 I'm talking in the published sheet music and commercially
8 released version of *Thinking Out Loud*.

9 THE WITNESS: Well, there is in my transcription
10 consistently all along from 2015. If we went back to several
11 slides, you would see that there is a blue third both over the
12 work. Do you see the little grace note?

13 MS. FARKAS: I'm not talking about the grace note.
14 I'm talking about the actual note that appears in the published
15 sheet music for *Thinking Out Loud*.

16 THE WITNESS: Well, neither your musicologist nor I
17 rely exclusively on the sheet music because that doesn't always
18 represent what's on the recording. So we both transcribe what
19 we heard on the recording.

20 MS. FARKAS: Well, let's focus on --

21 THE WITNESS: There is also a blue third further down
22 over the word smile.

23 MS. FARKAS: Let's focus on you because you're sitting
24 here and you're testifying. We will hear from Dr. Ferrara and
25 Dr. Ferrara -- we'll leave it at that.

1 I'm asking with your transcriptions and compared to
2 the published sheet music. If we look at the grace note there
3 and the blue notes you have put before the jury, is there a
4 blue note in the published sheet music of *Thinking Out Loud*?

5 THE WITNESS: I don't recall.

6 MS. FARKAS: Would you like me to show you?

7 THE WITNESS: Um, the point is whether there is or
8 there isn't, the sheet music for published sheet music for
9 songs is notoriously not representative of every detail of the
10 recording.

11 MS. FARKAS: So it's not --

12 THE WITNESS: For my entire career, I have not relied
13 just on the sheet music. If I'm learning a cover version of a
14 song, I listen to it and copy what's on the recording.
15 Sometimes the sheet music is accurate and sometimes it's way
16 off.

17 MS. FARKAS: OK. So I think that's a no, it's not in
18 the published sheet music; that's your testimony?

19 THE WITNESS: I don't recall. I relied on the
20 recording as the rep -- as embodiment of the composition as do
21 all of us. That's what was released as *Thinking Out Loud*. It
22 wasn't the sheet music that was copyrighted. It was the song,
23 the recording as representing as embodying the composition.

24 MS. FARKAS: I mean, Dr. Stewart and I are going to
25 continue to have a disagreement on this. So our position is

1 that's not the actual work at issue. We certainly can
2 cross-examine him on it further, but we're concerned about
3 things being played to the jury that are not accurate.

4 THE COURT: It's a difficult point, and I think it is
5 probably better for cross-examination. Then you can gather up
6 all the references and have them before you at once.

7 MS. FARKAS: OK. Thank you, your Honor.

8 BY MR. FRANK:

9 Q. Dr. Stewart, in connection with your engagement in this
10 case, have you had occasion to listen to *Thinking Out Loud* a
11 few times?

12 A. Many, many, many times.

13 Q. How many times would you say you've listened to it?

14 A. Well, I can't even estimate. 100, hundreds. Of course not
15 just listening in the sense of casual listening, but to
16 transcribe something or to put it into musical notation from
17 the recording requires incredibly close listening and comparing
18 every note, checking it on another instrument, such as a
19 keyboard, to make sure you've transcribed it correctly.

20 Q. And with respect to doing that, your testimony today is
21 that what we see here on the slide embodied in slide 65 is
22 actually the blue note that you reference, it's your testimony
23 that the blue note is in the audio recording that was
24 commercially released of *Thinking Out Loud*?

25 A. Yes. So what I heard on the word work was an inflicted

1 note and that is why there is a grace note there.

2 Now, in this example, it's represented -- I've
3 turned -- well, yeah, so over the word work, you see the
4 inflected note, and over the word smile you see the inflected
5 note also.

6 It's still the same degree of the scale. What I've
7 done here is just made it a little bluesier sounding for
8 comparison sake.

9 Q. Thank you.

10 Did you have any other observations or analysis
11 attendant to this particular slide?

12 A. No. I would just like to listen to the entire verse A now.

13 (Audio played)

14 So it's a subtle difference, but what I would also
15 like to point to is here, now we're getting to hear the second
16 and third and fourth phrases of verse 1A, and they follow the
17 same pattern. They are very similar to the first phrase,
18 except the second phrase and the fourth phrase are shorter.
19 That's one difference. But other than that, the repeating
20 basically the same melodic material that we heard in the first
21 phrase.

22 I just would reiterate that the pitch sequence that we
23 looked at a moment ago would be very similar as well as the
24 rhythms and the placement within the bar, the meter. The
25 underlying chords are almost identical. The harmonic rhythm is

1 identical. So this melodic expression is happening in the same
2 musical context in both songs.

3 Q. Dr. Stewart, could you share with us, the court, your
4 observations, your analysis with respect to the chorus melody,
5 first phrase of *Thinking Out Loud*?

6 A. Yeah. So now we turn to the second melodic similarity that
7 I identified, and this is in the chorus or the hook of *Thinking*
8 *Out Loud*. The first phrase has the pitch sequence that I've
9 notated below, 354433 and then 331 in black, because they are
10 not the same, and then ending on 23.

11 So here you have most of the pitches, almost all of
12 them the same. And in the notation, the musical notation, they
13 are also indicated in red. Once again, we're over the same
14 harmonic context and the harmonic rhythm as well, so...

15 Q. So to be clear, before you play the audio samples, the
16 numbers below depict the pitches, is that correct?

17 A. Yes. So that's the pitch sequence that we looked at in
18 terms of turning each melody into a sequence of numbers, Arabic
19 numbers in order to see the pitch sequence.

20 Q. And in the instances in which the pitches are red, that
21 means that they identify the same pitches, is that what you're
22 stating?

23 A. Yes.

24 Q. OK. Thank you.

25 Could you play the samples, Ms. Passey.

1 (Audio played)

2 OK. Did you have any other comments with respect to
3 the slide, Dr. Stewart, or any other analysis?

4 A. No. Let's look at the rest of the chorus.

5 So the chorus of *Thinking Out Loud* consists of three
6 phrases that are very similar to what the one we just heard and
7 then it goes to ending that I'll talk about in a minute.

8 Let's listen to the *Let's Get It On* phrase again, and
9 this is an important phrase in *Let's Get It On* because it
10 references the title. You see at the end of the phrase it says
11 *Let's Get It On*, so if you believe in love, *Let's Get It On*.

12 So let's listen to each example. First the phrase
13 from *Let's Get It On* and then the entire chorus of *Thinking Out*
14 *Loud*.

15 (Audio played)

16 So the only difference really of any significance is
17 the second phrase has a slightly different ending to it, on the
18 words 1,000 stars. Something else interesting about this is
19 that the end of the phrase from *Let's Get It On* with the words
20 *Let's Get It On* right here, *let's Get It On* is practically --
21 it's the same pitch sequence as you see at the ending of the
22 chorus of *Thinking Out Loud* down here.

23 I'm *Thinking Out Loud*, so it's the same pitches. So
24 even the ending of the chorus or the hook mirrors what we're
25 hearing in *Let's Get It On*.

1 Q. Do you have any other observations with regard to other
2 melodies that you believe have common elements?

3 A. Yes, I do. So I said at the outset that there were three
4 main melodic similarities, and this last one is related to the
5 phrase, we're all sensitive people, which is the opening phrase
6 of the second verse of *Let's Get It On*. This similar phrases
7 appear in several places in *Thinking Out Loud*.

8 So first let's listen to we're all sensitive people
9 with the, once again, the recording made by the defense of the
10 Deposit Copy.

11 (Audio played)

12 So the first instance where there is a similar phrase
13 in *Thinking Out Loud* is the second, and the second verse the
14 third phrase, when the vocal is when my hands don't play the
15 strings the same way, and we'll talk about the pitch sequence
16 in just a moment.

17 Let's go to the next slide.

18 This is essentially a descending scale with repeated
19 notes starting on eight seven and turn back to eight and then
20 seven and then to six.

21 Let's listen to the recording again from the Deposit
22 Copy recording made by the defense and then the excerpt from
23 *Thinking Out Loud* from the released recording.

24 (Audio played)

25 (Continued on next page)

1 THE WITNESS: Okay. On the next slide, we see a
2 similar phrase in the interlude of "Thinking Out Loud" on the
3 vocables. Now, vocables are nonlexical syllables, meaning they
4 don't actually have meaning like words. So tra, la, la, la is
5 a typical vocable. This is where the vocal in "Thinking Out
6 Loud" uses the syllables la, la, la, la, la, la, la, la, la,
7 la.

8 So let's compare again first from the recordings
9 themselves on the right.

10 (Audio played)

11 THE WITNESS: And I think for these examples we also
12 have audio on the transcription.

13 (Audio played)

14 THE WITNESS: You can hear, and you can see that in
15 "Thinking Out Loud" trails downward a bit further. The pitch
16 sequence is, again, there on the bottom left. This is sort of
17 a complicated diagram with a lot of arrows and numbers.

18 We can see that in "Let's Get It On;" there is a
19 similar pitch sequence in terms of going from 6 to 5, although
20 it's in the next phrase, and a 3 and, eventually, 1. So there
21 is a similar expression in "Let's Get It On," but admittedly it
22 is in the next phrase.

23 The pitch sequence at the bottom has a gap to show
24 where that occurs in "Let's Get It On" so there is no attempt
25 here to say that this is all a part of the same phrase, but it

1 is the next musical expression that you hear.

2 So there is one more spot where we hear a very similar
3 melody. And that's the guitar interlude that is kind of
4 nearing what you just heard of the vocables -- la, la, la. So
5 let's listen again to a recording made by the defense of "Let's
6 Get It On" and then an excerpt from "Thinking Out Loud."

7 (Audio played)

8 THE WITNESS: The pitch sequence again shows a
9 descending scale with repeated notes.

10 BY MR. FRANK:

11 Q. Do you have any other observations or analysis with regard
12 to the melodies?

13 A. No.

14 MR. FRANK: Can we go to the next slide, please.

15 Q. Can you identify what this particular slide is.

16 A. This is the concert footage which I believe is from Zurich.
17 It relates to what we've just been listening to.

18 Q. Dr. Stewart, for clarification to the Court, can you please
19 identify or explain the difference between mash-ups, medleys,
20 and interpolation.

21 A. Can we just listen to this more continuously to what we
22 just heard?

23 MR. FRANK: Absolutely.

24 (Audio played)

25 THE WITNESS: So what we heard there is the same

1 melody we just heard in "Let's Get It On" and in "Thinking Out
2 Loud" in those three places in "Thinking Out Loud," both in the
3 second verse, third phrase, and in the interlude twice.

4 Now, you asked a question about interpolation.

5 Q. Why do you refer to this particular slide as an
6 "interpolation" as opposed to a "mash-up" or "medley"?

7 A. There is a difference between all three of those. The
8 mash-up is when you have two recordings that are superimposed
9 over each other. So they're being played simultaneously.

10 A medley is when do a sequence of songs. Generally
11 you don't go back to the song you were playing before. When I
12 think of medley, I think of Las Vegas and hearing Elvis
13 Presley's hits one after another segueing from one to the next.

14 An interpretation is taking a song and inserting it
15 within another. So in this instance, the song from "Let's Get
16 It On" is inserted into "Thinking Out Loud," and then it goes
17 seamlessly right back to "Thinking Out Loud."

18 There's no -- it's not a medley because it goes back
19 to the other song. It's not a mash-up because it's not really
20 happening in terms of overlaying a song. again, that's more of
21 a recording.

22 So I think the important point here is that you can go
23 so easily from one to the other. Also this melodic similarity
24 that we've been listening to.

25 Q. If you would, Dr. Stewart, could you give us sort of a

1 brief summation of your analysis.

2 A. Sure. So in "Thinking Out Loud," there are three melodic
3 sections with important similarities -- pitch sequences, the
4 melodic contours, rhythmic elements, phrasing, and underlying
5 harmony.

6 And we hear it in verse 1A of "Thinking Out Loud." In
7 the chorus, we hear it almost throughout the entire chorus,
8 which, again, is the most valuable part of the song, and then,
9 again, the interlude which has the "We're All Sensitive People"
10 phrase, one of the most iconic phrases from "Let's Get it on."

11 Now, these are not exactly complicated melodies. We
12 don't really find a lot of complicated melodies in these songs.
13 It's not Mozart or Beethoven. But like so much popular music,
14 these are simple melodies, and they're happening -- and this is
15 so important -- they're happening in conjunction or
16 simultaneously with the same accompaniment. The accompaniment
17 is the same and the melodic figurations are the same.

18 Q. So per your analysis, Dr. Stewart, you would conclude that
19 the chords are identical and the harmonic rhythms are identical
20 of the song?

21 MS. FARKAS: Can you try not to lead the witness. Can
22 you let him just answer the question.

23 MR. FRANK: Sure.

24 Q. Can you describe your analysis with regard to the chords
25 and the harmonic rhythm.

1 A. Yes. They're almost identical. We've seen that there is
2 just a note that is sometimes present in one that's not in the
3 other. Again, it's identical harmonic rhythm with the
4 anticipated second and fourth chords. The melodic similarities
5 are happening with this. So it's the same creative choices in
6 terms of melodic notes and the underlying harmony.

7 Q. Now, Dr. Stewart, with respect to the work you do outside
8 of consulting and teaching, you teach; right? At the
9 University of Vermont?

10 A. Yes.

11 Q. Have you ever taught any courses that relate to music
12 copyright?

13 A. Yes.

14 Q. Could you describe that to the jury, just very briefly.

15 A. Yes. One course that I teach that's very popular is on
16 music copyright and music business. So this is a field that's
17 always rapidly changing, especially with technological
18 developments. So I've taught this course for a number of
19 years. And there is a lot of focus on music copyright, and we
20 look at different cases that have come up.

21 Q. Do you have occasion to deliver speeches or papers at
22 scholarly or academic conferences?

23 A. Yes. There was recently at the American Musicological
24 Society, which is kind of the premier scholarly society for
25 historical musical research. I had a paper accepted, which is

1 not the easiest thing to do. It's all peered to do.

2 The session was titled "Substantial Similarity in the
3 Role of the Forensic Musicologist in Copyright Litigation."

4 The title of my paper was "Melody, Beats, and Minimalism,
5 Copyright in Contemporary Popular Music."

6 Part of the point of that was to talk about, how, in
7 contemporary popular music, a lot of times these melodic
8 formations are rather simple or minimal, especially in rap and
9 hip-hop. So it was asking the question, how do we examine
10 substantial similarity in those contexts.

11 Q. As a professor who teaches music copyrighting testifies,
12 can you explain to the Court what prior art is.

13 A. Prior art is generally, in the context of music, it's songs
14 that came earlier than the earlier song. In the situation
15 that's being examined, so in this case, the earlier song
16 obviously was "Let's Get It On" from 1973. So prior art would
17 be songs that are earlier than 1973.

18 I have examined all of the prior art submitted by the
19 defense. There was something unusual in this case because
20 generally, when I'm engaged to work on something, there is not
21 already a prior art search. I do my own. Early on, almost as
22 soon as I was engaged in this case, I received Dr. Ferrera's
23 preliminary report, which already contained a prior art search.

24 And, in my experience, Dr. Ferrera's prior art
25 searches are pretty comprehensive. I've done prior art

1 searches concurrent with his where I haven't seen his, and we
2 come up with mostly the same material.

3 So I was able to base my preliminary report on the
4 same prior art that he was using to base his preliminary report
5 on.

6 Q. What is your opinion, one way or another, about the prior
7 art that was proffered by Dr. Ferrera?

8 MS. FARKAS: Your Honor, objection. This is
9 inconsistent with your Honor's prior ruling on his ability to
10 testify about any prior art search that he did as it's already
11 been ruled that he did not conduct a prior art search.

12 MR. FRANK: With respect to opposing counsel, she's
13 correct. The specific question that is before Dr. Stewart and
14 before the Court at this time if he had occasion to review the
15 prior art cited by their experts, not whether he did his own
16 report.

17 MS. FARKAS: That's not what he just said.

18 BY MR. FRANK:

19 Q. Did you have occasion to review the prior art that was
20 submitted by Dr. Ferrera?

21 A. Yes, even before I wrote my preliminary report.

22 Q. From reviewing those materials, did you come to any
23 conclusions?

24 A. Yes. And that is that the expression that I've been
25 looking at here with the melodies and the underlying harmonies,

1 none of the prior art identified comes close to containing this
2 same expression.

3 Some of the songs that were brought up don't predate
4 the songs at issue here, for example, Lionel Richie's "Do It To
5 Me," which is much later, 1992, or a Michael Jackson song. In
6 only one recording of "Georgy Girl," which was done by a rather
7 obscure Mexican band leader, is the harmonic rhythm with the
8 anticipated second or fourth chords the same as in "Let's Get
9 It On" and "Thinking Out Loud."

10 Q. To be clear, the "Georgy Girl", who originally did "Georgy
11 Girl"?

12 A. The hit was by the Seekers, and that was 1968.

13 Q. The version that was cited by Dr. Ferrera was not the
14 Seekers?

15 A. No, it wasn't.

16 Q. Whose version was it that was actually cited by
17 Dr. Ferrera?

18 A. I think one of the next slides will indicate that.

19 So this goes into it in somewhat more detail. Of the
20 15 songs containing this progression, only "Georgy Girl" has
21 this harmonic rhythm, and the best-known version by the
22 Seekers, the fourth chord is not even clearly anticipated.

23 Most importantly, the melodic similarities that we've
24 been looking to, especially, for example, the melodic
25 similarity of the chorus, there is nothing like that in "Georgy

1 Girl." So you don't have the same creative choice of melody
2 and harmony that you find in both "Thinking Out Loud" and
3 "Let's Get it on." Overall.

4 Go ahead.

5 Q. No. Please continue with what you were saying.

6 A. Why don't we listen to a little bit of "Georgy Girl".
7 There's an audio clip there.

8 (Audio played)

9 THE WITNESS: I think enough.

10 So if that sounds anything like the songs at issue in
11 this case, I don't hear it. The most important thing though is
12 there is no melodic similarity at all. Even the fourth chord
13 is not clearly anticipated like we heard.

14 Now, there is a version of "Georgy Girl", the easy
15 listening version, where the second and fourth chords are
16 clearly anticipated.

17 If we could just play a little bit of this.

18 (Audio played)

19 THE WITNESS: So the idea that that was an influence
20 on the creation of "Let's Get It On" is, I think, preposterous.

21 There was one other version identified by the
22 musicologist for the other side that's even more obscure. It's
23 a version by Beto Diaz. I've never heard of him, and I've
24 worked a lot on Mexican music, as you know.

25 It's next to impossible that this received any airplay

1 in the U.S. or that, before the internet, that ed Townsend
2 could have heard this. We could listen to a little bit of it.
3 This does have clearly anticipated second and fourth chords,
4 but you do not have any melodies, once again, that are similar
5 to the ones that I've looked at.

6 (Audio played)

7 THE WITNESS: Okay. So that's sort of an easy
8 listening, Mexican version of "Georgy Girl".

9 MR. FRANK: Can we proceed to slide 81, please.

10 Q. Can you explain your analysis here, Doctor.

11 A. Yes. So of these songs identified as "prior art,"
12 so-called, and the three principal melodic similarities that
13 we've looked at, there is only one of the melodies that has
14 anything remotely similar to what we were listening to in
15 "Thinking Out Loud" and "Let's Get it on."

16 And that is the descending scale, sequence 8, 7, 6 but
17 with the repeated notes. It's important that there are
18 repeated notes on this descending scale. The only one that has
19 that is "Fun, Fun, Fun" by the Beach Boys.

20 But see the melody is completely different. It starts
21 with 5, 6, 5. "We'll have fun, fun, fun 'till daddy takes the
22 keyboard away." It goes up and then down and then back up
23 again and then down. So it's not just the descending scale.

24 Again, although this is the only one that has that
25 similarity in terms of the descending scale with the repeated

1 notes, it doesn't sound like anything like what we heard with
2 "We're All Sensitive People", that phrase.

3 Q. Did you have an audio clip to accompany this?

4 A. I do.

5 (Audio played)

6 BY MR. FRANK:

7 Q. In your opinion, Dr. Stewart, are any of the prior art
8 cited by the defendant, are any of them applicable in this
9 case?

10 MS. FARKAS: Objection. Leading.

11 THE WITNESS: Are they applicable?

12 BY MR. FRANK:

13 Q. Are they appropriate prior art?

14 MS. FARKAS: Same objection. I don't know what that
15 means. Perhaps he can explain.

16 THE COURT: Overruled. That objection is overruled.

17 BY MR. FRANK:

18 Q. Dr. Stewart, can you repeat the question, please.

19 MR. FRANK: Sure.

20 Q. Do you believe that the prior art that's been cited by the
21 defendants, in your professional opinion, is appropriate in
22 this instance?

23 A. Well, the works that predate the songs at issue here that
24 have the same chord progression, yes, are appropriate for
25 comparison's sake. But I would like to reiterate that none of

1 them have the melodic similarities that we looked at. So the
2 chorus, which is so similar between each of these songs, there
3 is nothing in any of this art that is like that.

4 So the creative choices, the selection and arrangement
5 of materials that we hear that are common between "Let's Get It
6 On" and "Thinking Out Loud" are not found in any of these
7 works.

8 Q. Dr. Stewart, did you get the opportunity to review the
9 deposition that was taken of Ed Sheeran in connection with this
10 case?

11 A. I looked at some of it, yes.

12 Q. Are you aware that Mr. Sheeran cites Van Morrison and
13 "Crazy Love" as inspiration for "Thinking Out Loud"?

14 MS. FARKAS: Objection. Mischaracterizes the
15 testimony.

16 BY MR. FRANK:

17 Q. Are you aware of Mr. Sheeran's allusion to Van Morrison?

18 A. Yes, I am.

19 Q. Did you have occasion to read that particular portion of
20 the deposition?

21 A. Yes, I did.

22 Q. Do you have any opinion one way or another as to the
23 legitimacy of that reference?

24 MS. FARKAS: Objection.

25 MR. FRANK: I'll withdraw.

1 Q. Dr. Stewart, are you aware of any Van Morrison songs or,
2 "Crazy Love" in particular, that have common elements with
3 "Thinking Out Loud"?

4 A. Well, as I read the transcript -- and I looked at some of
5 the video -- I understood Mr. Sheeran to say that his
6 inspiration for the song was Van Morrison's "Crazy Love" and,
7 in fact, they were calling it "the Van Morrison song" for a
8 while.

9 But "Crazy Love" is nowhere near as similar as "Let's
10 Get It On" is to "Thinking Out Loud." First of all, it only
11 has three chords. So after the 1, 3, 4, progression that we've
12 seen, it goes right back to 1. So it spends most of its time
13 on the 1 chord. So it's not nearly as similar as anything that
14 we've listened to, especially "Thinking Out Loud" and "Let's
15 Get it on."

16 He also says that all songs have the same four chords,
17 and I think that's obviously untrue. This one only has three.

18 Q. For the record, Dr. Stewart, how many chords does "Thinking
19 Out Loud" have?

20 A. Four.

21 Q. Four?

22 A. Yes.

23 Q. Thank you.

24 MS. FARKAS: For the record, I want to object to that
25 last line as also mischaracterizing Mr. Sheeran's testimony.

1 BY MR. FRANK:

2 Q. Dr. Stewart, slide 83.

3 Dr. Stewart, what do you mean when you say "emulation"
4 on this particular slide?

5 A. That was Mr. Sheeran's word in his deposition. So this
6 takes a closer look at "Crazy Love," just again to show how it
7 is not merely as similar as "Let's Get It On" and "Thinking Out
8 Loud."

9 I've circled the chords in green so you can see it
10 goes D, F sharp, G, and then back to D. So it spends most of
11 its time on D. It never goes to the 5 chord. It keeps
12 resolving back to the tonic or 1 chord every two measures.

13 It goes back before it reaches the end of the second
14 measure. So it has a very different kind of feel. The only
15 harmonic anticipation is on that fourth chord when it goes back
16 to D, the fourth chord which is a repeat of the first chord.
17 So it's not a fourth chord that is different.

18 I have an audio example here so you can hear that it's
19 really nothing like what we've been listening to.

20 (Audio played)

21 THE WITNESS: So when we get to that section about
22 love, love, love, of course that's totally different too. It's
23 not the same chords at all. It's completely different chords.

24 BY MR. FRANK:

25 Q. So, to summarize, what are your opinions with regard to the

1 prior art cited by the defendants?

2 A. So the creative selection and arrangement of the expressive
3 material is different in "Let's Get It On" than any of these
4 other songs. So none of these songs are as similar to "Let's
5 Get It On" and "Thinking Out Loud" as "Let's Get It On" and
6 "Thinking Out Loud" are to each other.

7 Q. Do you believe that "Let's Get It On" was original for its
8 time?

9 A. I do.

10 MS. FARKAS: Objection. He is specifically prohibited
11 from giving such testimony, and he just violated another court
12 order.

13 THE COURT: Sustained.

14 MR. FRANK: If you could go to the next slide, please.

15 Q. Could you explain your opinion here as it relates to
16 interpolations.

17 A. Yes. As the slide says, the interpolation speaks to the
18 innate similarity between these two songs because it's possible
19 to move so effortlessly from one to the other. There are no
20 changes required whatsoever to make this transition, both to
21 "Let's Get It On" and back to "Thinking Out Loud."

22 So the songbeds, the foundation of each song, is
23 identical. Interestingly, it goes right very soon -- in the
24 interpolation it goes right to the "We're All Sensitive People"
25 phrase, which has a corollary in "Thinking Out Loud" as we've

1 seen.

2 Q. Have you had the opportunity to review some of the other
3 concert footage or videos of Mr. Sheeran doing one or more
4 songs together?

5 A. Yes, I have.

6 Q. Which ones have you reviewed? And could you speak to that?

7 A. Well, I looked at about 15 different concert recordings,
8 videos. And none of them are like this transition from or
9 interpolation from "Thinking Out Loud" to "Let's Get It On" and
10 back to "Thinking Out Loud."

11 They're all very different. First of all, most of
12 them are medleys. So they're a string of songs played one
13 after another. They never go back to the original song. They
14 progress from one song to the next.

15 Q. Do you know, as you sit here, the videos of the medleys,
16 that you saw, do you know one way or another, as you sit here
17 today, whether those medleys predated the interpolation we've
18 seen here today that we've referred to as "the Zurich video"
19 where Mr. Sheeran plays "Let's Get It On" and "Thinking Out
20 Loud"?

21 MS. FARKAS: Objection. Irrelevant.

22 THE WITNESS: I honestly don't know. I'm not sure. I
23 think most of those videos were from 2014 to 2015.

24 BY MR. FRANK:

25 Q. What were the specific mash-ups that you reviewed?

1 A. There were no mash-ups.

2 Q. What were the specific melodies that you reviewed?

3 A. If we could go to the next slide.

4 One example is "Take It Back" where Mr. Sheeran goes
5 into "Superstition" and then eventually into "Ain't No
6 Sunshine" by Bill Withers. He essentially stays on the chord
7 changes of "Take It Back." So these are not standard chord
8 changes for either "Superstition" or "Ain't No Sunshine."

9 I guess it fits with his concept of all songs have the
10 same four chords, but these are not the standard chords for
11 "Superstition" or "Ain't No Sunshine."

12 Another example is "Can't Help Falling In Love" which
13 he does play the standard chord changes and then goes into
14 "Thinking Out Loud." That is clearly a medley. He doesn't go
15 back to "Can't Help Falling In Love."

16 And then two of his originals, "Kiss Me" and "Thinking
17 Out Loud," which, again, have different chord changes, so it's
18 very clear that he's moving from one to the other. There is no
19 seamlessness like you hear with "Thinking Out Loud" and "Let's
20 Get It On." And, again, no return back to the first tune. So
21 it's not moving from one song to another and then back again.
22 It's a medley.

23 Q. As opposed to an interpolation?

24 A. Yes.

25 Q. Were there any other selections that you had the occasion

1 to review?

2 A. I think the next slide. Yes. In the first one there,
3 "Take It Back," we talked about that. The next one on the list
4 here -- "Loyal," "No Diggity," the "Next Episode," and
5 "Nina" -- don't. "No Diggity" and "Next Episode" are raps.

6 So on the original recordings, they're basically one
7 chord. They're not a chord progressions at all. Again, it's a
8 medley. It doesn't go back to the first song.

9 A basic characteristic of a lot of rap is that it
10 could happen over any kind of chord changes because the melodic
11 considerations are minimal. So the basic underlying music
12 could be anything, unlike the transition, again, from "Thinking
13 Out Loud" into "Let's Get It On" and back to "Thinking Out
14 Loud."

15 Q. In the materials that you reviewed, other than the video
16 that we saw which was "Thinking Out Loud" and "Let's Get It
17 On," are you aware of any other instances of interpolation by
18 Mr. Sheeran?

19 A. There is one very short example where he briefly plays a
20 guitar with from Eric Clapton from Layla. That's the only
21 instance of interpolation that I recall hearing.

22 So, once again, the example we've seen of "Let's Get
23 It On" and "Thinking Out Loud" is unique.

24 Q. Do you have any other opinions or analyses as it relates to
25 Mr. Sheeran's interpolations or medleys?

1 A. If you go back to the last slide, there was one other
2 example. In "Take It Back," he briefly goes into the
3 Backstreet Boys' "Everybody" for about eight seconds or six
4 seconds at the end just to end his song. So, again, it's a
5 very different thing than what we've heard in the video from
6 Zurich.

7 Q. Dr. Stewart, in light of all the materials that you've
8 reviewed and in your professional experience, do you believe
9 that Mr. Sheeran and Amy Wadge copied "Let's Get It On"?

10 A. I think the preponderance of the evidence shows that there
11 was copying.

12 MS. FARKAS: Objection, your Honor.

13 MR. FRANK: I'll withdraw the question, and I'll
14 re-ask it.

15 THE COURT: Sustained.

16 BY MR. FRANK:

17 Q. Dr. Stewart, do you have an opinion as to whether Amy Wadge
18 and Ed Sheeran copied "Let's Get It On"?

19 A. I can answer that.

20 Q. Do you have an opinion?

21 A. Yes, I do.

22 Q. What is that opinion?

23 A. That, yes, there was some copying.

24 Q. What leads you to believe that there was copying by Ed
25 Sheeran and Amy Wadge?

1 A. Because you see this unique combination of creative choices
2 between the melody and the accompaniment.

3 MS. FARKAS: Your Honor, I'm going to interrupt the
4 witness because he keeps using the word "unique" that
5 your Honor has prohibited him from uttering in this courtroom.
6 And I move to strike this witness' entire testimony on that
7 basis. He has to be admonished at a minimum. This is
8 outrageous.

9 THE COURT: He's been doing that kind of thing all
10 afternoon without your objection, and I've been sustaining them
11 when you did object, and I'm sustaining this one.

12 MR. FRANK: If we could go to the next slide, please,
13 the last slide, I believe.

14 Q. Dr. Stewart, having reviewed the materials in question and
15 based on your professional experience, do you have an opinion
16 as to how much of "Thinking Out Loud" is attributable to
17 infringing upon "Let's Get It On"?

18 A. Well, in my declaration, I estimated a value of 70 percent.
19 And that's based on the chorus, which is considered, as I've
20 said before, the hook, which is the most memorable and valuable
21 part of the song.

22 So the choruses of these songs being so similar
23 melodically and of course with the underlying chords, I think
24 that standard procedure in musicology is to take the
25 quantitative assessment, which would be maybe a cruder

1 measurement, just in terms of the amount of time that the
2 similar consent it present. But that -- it can be adjusted
3 upward or downward according to the qualitative assessment of
4 the value of the expression.

5 So given that the chorus is generally considered the
6 most valuable expression, that's the number for the musical
7 value that I found, 70 percent.

8 MR. FRANK: Thank you, Dr. Stewart.

9 If it please the Court. I'd like a moment to confer
10 with my colleagues. I think we're either done or just about
11 done.

12 (Counsel confer)

13 MR. FRANK: Your Honor, while we reserve the right to
14 redirect, we tender the witness at this time.

15 THE COURT: Let's take a ten-minute recess. Then you
16 will have the floor.

17 (Recess)

18 (In open court; jury present)

19 CROSS-EXAMINATION

20 BY MS. FARKAS:

21 Q. Good afternoon, Dr. Stewart.

22 A. Good afternoon.

23 Q. You are here to testify whether you believe there are
24 musical similarities between the two songs; right?

25 A. Yes.

1 Q. And you're not here today to offer an opinion on whether
2 "Thinking Out Loud" infringes "Let's Get it on." Correct?

3 A. Correct.

4 Q. And in fact, you're not allowed to offer such an opinion;
5 correct?

6 A. Correct.

7 Q. And in fact, this Court has ordered that you're not
8 permitted to testify as to whether any part or parts of "Let's
9 Get It On" are unique or distinctive; correct?

10 A. That's my understanding.

11 Q. And that's because the Court properly ruled that you did
12 properly not look into whether, in fact, "Let's Get It On" or
13 any of its constituent elements are unique to "Let's Get it
14 on." Correct?

15 A. Well, I think that's a misunderstanding of how this case
16 developed. Because, for me --

17 Q. I just asked you a yes or no question, Dr. Stewart.

18 A. This is not the way a case usually evolves for me. I was
19 given a prior art search when I first started working on it.
20 Usually I don't start with any prior art search and have to do
21 my own.

22 Q. Dr. Stewart, let me read to you the order that I was
23 referring to. Maybe that will streamline things a little bit.
24 on August 18, 2020, this Court ordered:

25 "For reasons particular to this case, Dr. Stewart

1 shall not characterize "Let's Get It On" or a constituent
2 element of it, such as a chord progression or harmonic rhythm,
3 as being unique, distinctive, unusual or the like. That is
4 because such opinions were not disclosed in his report, his
5 prior art research was not such as to support them, and there
6 is uncontradicted proof that those elements in this case are
7 common musical techniques."

8 Do you take issue with that ruling?

9 A. I understand the ruling, and I hope I followed it in every
10 way. I did use some of those words in my reports and could
11 point to them. It seems like a misunderstanding to me. I
12 respect the ruling and have attempted to follow it.

13 Q. We can differ on that. In fact, you have admitted that the
14 chord progression and the anticipation that's at issue in this
15 case appears in at least one other prior song before "Let's Get
16 It On"; right? "Georgy Girl." Correct?

17 (Interruption)

18 (Continued on next page)

1 THE COURT: Let's resume.

2 MS. FARKAS: I have a question pending, I'll just
3 repeat it.

4 Your Honor, do you want me to proceed?

5 I want to be respectful of the plaintiff's ...

6 I want to be respectful of what is going on at
7 plaintiff's table.

8 THE DEPUTY CLERK: Do you want to take a recess?

9 THE COURT: We just had one. As soon as the
10 electronics will allow it.

11 Mr. Frank, come up to sidebar. We've got to figure
12 this out.

13 (Continued on next page)

14

15

16

17

18

19

20

21

22

23

24

25

1 (At the sidebar)

2 MR. GOLDSMITH: If I can, your Honor.

3 My concern is that the jury is distracted, obviously,
4 by this and I'm worried about proceeding when they are in a
5 distracted state and about the condition of the plaintiff.

6 I know that counsel for the plaintiffs, I think, want
7 to stop at this point and take care of the plaintiff.

8 THE COURT: Everything is being done that can be done.

9 MR. GOLDSMITH: I understand that, your Honor. I just
10 worry about the jury having seen this being sort of
11 distracting.

12 THE COURT: The main thing for the jury is to be
13 entertained by cross-examination and in the usual way. We'll
14 end the usual time, which is very close.

15 MR. GOLDSMITH: If your Honor is comfortable the jury
16 is not going to be distracted, we're fine with going ahead.

17 THE COURT: I think they are a great more collected
18 than you are.

19 MR. GOLDSMITH: I'm reasonably collected. I only seem
20 not.

21 MS. JACKSON: Your Honor, Ms. Griffin is passed out --
22 Ms. Griffin, if we could not let the jury go not hallway, your
23 Honor, because she's in the hallway on the ground.

24 THE COURT: Who are you representing?

25 MS. JACKSON: I'm with Mr. Crump. I work with

1 Mr. Crump, your Honor. I'm with Mr. Crump. I work with
2 Mr. Crump.

3 MR. FRANK: She's an attorney with the Crump firm.

4 THE COURT: What are you proposing?

5 MS. JACKSON: She's laying in the hallway.

6 THE COURT: She can go home.

7 MS. JACKSON: No, sir. She has passed out. She's --

8 LAW CLERK: She's unconscious.

9 THE COURT: Whoever can take care of her, can take
10 care of her. If you wish to be excused and take care of her,
11 you're welcome to go.

12 MS. JACKSON: Yes, sir.

13 (Continued on next page)

1 (In open court)

2 THE COURT: Everything is being done that can be done
3 and we have no way of contributing to it. One of her friends
4 and counsel has just gone out to be with her. There is no
5 reason for us not to continue.

6 MS. FARKAS: OK.

7 BY MS. FARKAS:

8 Q. Dr. Stewart, you have admitted that the chord progression
9 and anticipation that's at issue in this case appears in at
10 least one song prior to *Let's Get It On, Georgy Girl*, correct?

11 A. In the two iterations by the Mexican band leader and the
12 easy listening version, yes.

13 Q. OK. We'll get to that song. That's my only question.
14 Thank you.

15 We'll get to that in a little while. I would like to
16 talk a little more about the chord progression.

17 You're aware that the court has ruled that the *Let's*
18 *Get It On* chord progression, that there is uncontradicted proof
19 in this case that the chord progression is common, correct?

20 A. That's my understanding.

21 Q. And that ruling was issued after you rendered your report
22 in this case, correct?

23 A. I believe so.

24 Q. And, in fact, the chord progression is included in basic
25 how to play guitar and piano instruction books, correct?

1 A. Without the anticipation.

2 Q. Yeah, I'll take you through everything. I'm just talking
3 about the chord progression right now.

4 Correct?

5 A. As I recall, yes.

6 Q. I'm going to hope it's the same slide because it's changed
7 a bit. Can we look at your slide 24, please.

8 Looking at your slide 24, you have testified that the
9 basic chord progression in *Let's Get It On* is the 1,3,4,5,7,
10 correct?

11 A. In the Deposit Copy, yes.

12 Q. Correct. And *Thinking Out Loud*, that's all that is at
13 issue here, Dr. Stewart.

14 And in *Thinking Out Loud*, it's the 1,1,3,4,5, correct?

15 A. Not during the first 24 seconds.

16 Q. OK. We'll get to that, too. But that's your slide, right?

17 A. Yes.

18 Q. OK. And let's focus on the second chord in *Let's Get It*
19 *On*.

20 That's a minor chord, correct?

21 A. Yes.

22 Q. And the second chord in the *Thinking Out Loud* progression
23 is a major chord, correct?

24 A. It's the same pitches over the same note.

25 Q. Is it a major chord?

1 A. It is a major one chord with a three in the rote, which is
2 a distinct sound.

3 Q. Is it a major chord; yes or no?

4 A. Yes. It's indicated by my --

5 Q. Thank you.

6 A. -- upper case Roman numeral I.

7 Q. OK. You were the one fighting me on it. I'm just trying
8 to get the answer to my question.

9 Major chords and minor chords are not the same, are
10 they?

11 A. That's correct.

12 Q. And the fourth chord in the *Let's Get It On* progression is
13 a five seven chord, correct?

14 A. In the basic, yes, in the Deposit Copy, um-hmm.

15 Q. There's no seven after the five chord and the fourth chord
16 of *Thinking Out Loud*, correct?

17 A. Well, in this basic outline of the harmony, there isn't.
18 But even in Dr. Ferrara's analysis, there are iterations of the
19 chord progression where there is a seventh present in the
20 fourth chord.

21 Q. I'm looking at your slide. I'm not trying to complicate
22 things. I'm just looking at the slide and asking you some
23 questions about it, OK.

24 So a five and a five seven are not the same exact
25 chord, correct?

1 There's an extra note there, as you put in your own
2 slide, correct?

3 A. Yes. But it's, as I've said, that extra note appears all
4 over the place in *Thinking Out Loud*, too. So this is a basic
5 harmony.

6 Q. This extra note in the five seven chord in *Let's Get It On*,
7 you talked about for some time during your testimony, right;
8 you said it could be at the top, you said it could be at the
9 bottom, right?

10 A. Yes. Any of these notes and these chords can be reordered
11 in different ways.

12 Q. OK. But I'm saying you spent some time talking about the
13 various ways this fourth note could appear.

14 You obviously found some significance to it, correct?

15 A. Pardon?

16 Q. You spent some time in your testimony talking about this
17 fourth note in the five seven chord and saying that it could
18 either appear at the bottom of the three notes or at the top of
19 the three notes, correct?

20 A. Yes.

21 Q. And you actually sat at the piano and testified that it's
22 different to you depending on where it appears, right?

23 A. Yes. I mean, it's one reason that recording that you made
24 of *Thinking Out Loud* -- I mean of *Let's Get It On* -- is so
25 cheesy sounding is because of that chord, that it was voiced on

1 that recording.

2 Q. Can we look at slide 29, please.

3 So this is something that you also testified about and
4 you refer to quite a bit in your testimony. Do you see any
5 versions of the *Thinking Out Loud* chord progression where the
6 fourth chord is a V7?

7 A. Yes.

8 Q. Where is that?

9 A. The eleventh implies that there is a seventh also. Usually
10 when you're using chord symbols like this, if you're working
11 your way up the chord, it assumes that the lower -- these are
12 called extensions of the chord, the ninth, the eleventh, and
13 the thirteenth.

14 Q. What --

15 A. So the assumption in music theory is that if you have these
16 upper extensions like the ninth or the eleventh, that there is
17 seventh, also.

18 Q. Is your testimony that it doesn't matter if a chord
19 progression has a five chord or a five seven chord, it's all
20 the same to you?

21 A. No, I didn't say that. I said when it says 511, that
22 implies that there is a seventh present.

23 Q. So if it is five or five seven or five one one, all those
24 are the same to you?

25 A. No, I didn't say that.

1 Q. They are different?

2 A. Well, if it just says five, that implies that it is only
3 the triad that wrote the third and the fifth.

4 Q. And there is a seven or 11 or any other number, there is an
5 extra note there, correct?

6 A. At least one. There could be more.

7 Q. Now, I believe you testified earlier that you in performing
8 your analysis of *Thinking Out Loud*, that you listened to the
9 song, I think you said, hundreds of times; is that an accurate
10 summary of what you said?

11 A. I think so because. This has been going on for eight
12 years, so it's been an awful lot of time.

13 Q. And you spent a significant amount of time listening to the
14 recording when you were performing your analyses in this case,
15 I assume, correct?

16 A. Yeah. And to transcribe this to put it into musical
17 notation, you really have to go through it note by note by
18 note, and not just the melody, but all the parts that are
19 present on the recording.

20 Q. And you do that, at the risk of asking you a silly
21 question, you do that to try to get it right, right?

22 A. That's my attempt, yes.

23 Q. You offered a report in this case, correct?

24 A. Several.

25 Q. And let's focus on the 2017 report.

1 Everything you said in that report was, to the best of
2 your knowledge, truthful and accurate, correct?

3 A. At the time. I mean, over eight years there's been some
4 evolution in my thinking and of the analysis. I mean, it's not
5 static.

6 Q. You spent a good amount of time preparing that report and
7 writing it, correct?

8 A. Yes.

9 Q. And you also submitted a declaration in this case in 2018,
10 right?

11 A. Yes.

12 Q. And you're aware that a declaration is sworn statement
13 under oath subject to the penalty of perjury, correct?

14 A. Yes.

15 Q. And everything in your declaration was, to the best of your
16 knowledge, truthful and accurate, correct?

17 A. Yes.

18 Q. You've testified that the first 24 seconds of *Thinking Out*
19 *Loud* that the second chord is not a D/F sharp chord or a one
20 three chord, but that it's the three chord which you claim, you
21 know, is the same as the second chord in *Let's Get It On*,
22 correct?

23 A. Well, I said that the note that would make it the one chord
24 over the three, the one note that would make it that is not
25 present in the guitar playing, which is the only accompaniment

1 during those first 24 seconds.

2 Q. OK. Isn't it true, Dr. Stewart, that in both your report
3 and in your 2018 declaration, you transcribed the second chord
4 during the first 24 seconds of *Thinking Out Loud* as a D/F sharp
5 major and not a three chord?

6 A. I don't recall doing that, no.

7 Q. OK. Well, let's refresh your recollection then.

8 Can we project -- actually, this is just for
9 demonstrative purposes, your Honor. I would like to project
10 the transcription of your opening themes from *Let's Get It On*
11 and *Thinking Out Loud*, which is from page seven of your report.

12 His 2017 report, I will represent to you that this is
13 from page seven of your 2017 report and the same transcription
14 appears on page 18, paragraph 64 of your declaration.

15 What have you transcribed here as the --

16 Well, let me take a step back. Looking at the
17 timestamp for *Thinking Out Loud*, what's the timestamp there?

18 A. The beginning of the piece, zero.

19 Q. This would include the first 24 seconds, wouldn't it?

20 A. Um-hmm.

21 Q. Yes?

22 A. Yes.

23 Q. Looking at the second chord there, what have you
24 transcribed there?

25 A. I have put D/F sharp. I was mistaken when I put that.

1 Q. So you were mistaken in the report after you listened to
2 the song hundreds of times?

3 A. Well --

4 Q. Yes or no?

5 A. -- this is an evolving process, and at some point during
6 this work over the eight years, I did more detailed
7 transcription, as did your musicologist. Regarding the first
8 24 seconds in particular, we both did detailed transcriptions
9 of the guitar part during those first 24 seconds.

10 Q. OK.

11 A. And, moreover, I've testified that this single note is not
12 significant in the way it sounds anyway.

13 Q. Well, so you're saying -- what are you saying, the second
14 chord is insignificant?

15 A. No. I'm saying that that note is not there during the
16 first 24 seconds.

17 Q. OK.

18 A. And if I wrote a wrong chord symbol there, then I was
19 wrong.

20 Q. OK. Well, it seems that you continued to be wrong in your
21 declaration, which was submitted the next year in 2018, where
22 you have the same transcription.

23 A. Well, if I may --

24 Q. No, there's actually no question pending, come to think of
25 it.

1 So, Dr. Stewart, are you wrong -- were you wrong then
2 or are you wrong now?

3 A. In both your musicologist's transcriptions --

4 MS. FARKAS: Your Honor, I would ask that you instruct
5 the witness to answer any questions instead of constantly
6 referring to what our expert musicologist did.

7 THE COURT: Try to answer this question without
8 reference to your opposing expert, although I gather you put a
9 deal of reliance in his views.

10 Would you repeat the question?

11 MS. FARKAS: Sure, your Honor.

12 BY MS. FARKAS:

13 Q. Dr. Stewart, were you wrong then or are you wrong now about
14 the second chord in *Thinking Out Loud*?

15 A. I was wrong then, and it's really a function of cut and
16 paste, which we are all very familiar with. So cutting and
17 pasting in this example from my earlier reports was what I did
18 here.

19 Q. Is there --

20 A. That note does not appear in any of our transcriptions
21 during those 24 seconds. What can I say, it's not there,
22 so ...

23 Q. Well, it is there.

24 A. It's an error.

25 Q. Your report is about 11 pages and there is only a handful

1 of transcriptions, and you rely quite heavily on this
2 particular melody in your report for your conclusion of
3 copying.

4 And so are you suggesting that you just -- when you do
5 an analysis for a claim of copying and infringement, that you
6 just take the defendant's musicologist's reports and you cut
7 and paste their transcriptions; is that what you're saying?

8 A. No.

9 Q. So what do you cut and paste?

10 A. From my prior reports. And, um, to prepare these music
11 examples is a pretty tedious process using music notation
12 software. This is not a significant difference. I'm perfectly
13 happy to admit that it's an error.

14 Q. So it's also an error -- so this is your 2017 report and in
15 your 2018 sworn declaration, that was another error?

16 A. Apparently so.

17 Q. I would like to show you what has been marked as Joint
18 Exhibit 4 in this case.

19 Can you please identify this for us?

20 A. That is a version of the sheet music of *Thinking Out Loud*
21 and --

22 Q. Would you agree that the first line of music in this
23 published sheet music corresponds to a portion of the first
24 24 seconds of *Thinking Out Loud*?

25 A. Yes. It's not exactly what I hear on the recording, but

1 sheet music is not usually that faithful in every detail.

2 Q. Well, you heard it hundreds of times and you actually
3 transcribed the same thing, so...

4 A. Not exactly, because I put it an inflection on the note
5 above work.

6 Q. Right, the grace note. We'll get to that, too. I'm
7 talking about the chords now.

8 Would you agree that the second chord in the first
9 line of the music in this published sheet music for *Thinking*
10 *Out Loud* is D/F sharp major?

11 A. That's the symbol that's used, but if you look down below
12 where you are not showing it, there is no D.

13 Q. I'm not asking -- I'm asking you what the chord progression
14 that is reflected in the published sheet music of *Thinking Out*
15 *Loud*, is it D/F sharp major?

16 A. It's -- that is the chord symbol, but that is not
17 necessarily the notes that are being played. Because if you
18 look below, those notes are being played. There is no D.

19 Q. You're saying the sheet music is wrong now?

20 A. Yes.

21 Q. OK. But the D/F sharp major, that is a one/three in Roman
22 numerals, correct?

23 A. Yes.

24 Q. OK. So your own report, your own sworn statement and the
25 published sheet music all say one three, but now you are saying

1 that it's not that, and you want to make it more similar to

2 *Let's Get It On*, is that correct?

3 A. Not at all, because if my declaration -- and I know in my
4 declaration I made a detailed description of these opening
5 24 seconds with the transcription of every note of the guitar,
6 as did the other musicologist, and they both -- we both agreed
7 that note is not there.

8 Q. But I'm talking about --

9 A. So the chord symbol --

10 Q. Excuse me, Dr. Stewart. I'm talking about the melodies in
11 the transcriptions that you have placed in issue in this place,
12 not other parts of other transcriptions you did.

13 So let's stay on topic. You also claim similarity
14 with respect to the anticipation used in the chord progression,
15 correct; you say that the second and fourth chords are played
16 before or ahead of the beat, correct?

17 A. I'm sorry, could you repeat that?

18 Q. You claim similarity with respect to the anticipation
19 that's used with the chord progressions at issue, correct?

20 A. Yes.

21 Q. And that the second and fourth chords are played ahead of
22 the beat?

23 A. Yes.

24 Q. And you're aware that the court has ruled that there is
25 uncontradicted proof in this case that anticipation is common,

1 correct?

2 A. Of course. It's not --

3 Q. Are you aware of that?

4 A. It's with this combination of chords in anticipation that
5 it's not common.

6 Q. That's not my question?

7 A. Yes. But, of course, anticipation as a consent is common,
8 yeah. How could you --

9 Q. Before writing your report in this case, did you review all
10 of Ed Sheeran's prior songs?

11 A. No.

12 Q. Did you review any of them?

13 A. Yes.

14 Q. Were you aware that Ed Sheeran himself used anticipation in
15 at least 20 songs that he wrote before *Thinking Out Loud*?

16 A. That would not surprise me at all. All people use
17 anticipation. I mean, not all, but many, many composers,
18 songwriters, use anticipation. There has never been any claim
19 that anybody can own anticipation, that it's ...

20 Q. Well, when we're talking about the combination of the chord
21 progression and the anticipation that's at issue here, you're
22 aware that you are prohibited from saying whether or not that
23 combination is unique to *Let's Get It On*, right?

24 A. I'm not sure if I'm prohibited from saying the combination
25 is.

1 Q. Did you read the court's ruling before you testified today?

2 A. I did, and it was not clear to me that I couldn't say the
3 combination. But I would appreciate clarification. I thought
4 that separately the idea that anticipation and separately the
5 chord progression couldn't be considered that way.

6 Q. So let's get you that clarification then.

7 For reasons particular to this case, Dr. Stewart shall
8 not characterize *Let's Get It On* or a constituent element of
9 it, such as a chord progression or harmonic rhythm, as being
10 unique, distinctive, unusual, or the like.

11 So it refers to any other constituent element of it.
12 Does that give you some clarification?

13 A. Well, the way I read that, it says "or," it doesn't say
14 "and." And so I read it as they are separate concepts, which
15 indeed they are.

16 Q. But, of course, maybe it doesn't matter because you've
17 already acknowledged that there is at least one song that has
18 that combination previous to *Let's Get It On*, right?

19 MR. FRANK: Objection, calls for legal conclusion.

20 MS. FARKAS: I'm not asking for a legal conclusion.
21 It was the same question he already answered before.

22 MR. FRANK: You said does it matter.

23 THE COURT: Overruled.

24 I think it calls for a factual conclusion.

25 MR. FRANK: Thank you, your Honor.

1 BY MS. FARKAS:

2 Q. Can you answer the question?

3 A. Could you repeat it, please?

4 Q. Probably not. I'll do a similar one.

5 You agree that *Let's Get It On* was not the first song
6 to combine the chord progression at issue and the anticipation
7 at issue, correct?

8 A. Combined the chord progression and what?

9 Q. The anticipation of the second and fourth chords, correct?

10 A. That's correct. We have heard *Georgy Girl*.

11 Q. You admitted that the same combination appears in at least
12 two versions of a song called *Georgy Girl*, correct?

13 A. Yes.

14 Q. And if you look at your slide 78, you admit that a version
15 of *Georgy Girl* has the same chord progression with the
16 anticipation of the second and fourth chords as well; you admit
17 that on your slide, correct?

18 A. Yes, the two very obscure versions that would not have had
19 widespread popularity.

20 Q. Right. But whether or not it is obscure or popular or
21 anything, it existed before *Let's Get It On*, correct?

22 A. Yeah. But my understanding, and I'm not a lawyer, but my
23 understanding that if it's not copied, it's original.

24 MS. FARKAS: Move to strike, your Honor.

25 MR. FRANK: He was answering a question, your Honor.

1 THE COURT: I think we're quarreling over words. The
2 motion is denied.

3 Q. If we look at your slide 79, there's another version of
4 *Georgy Girl* that has the same combination of the chord
5 progression and anticipation of the chords, the one by 101
6 Strings Orchestra, correct?

7 A. Yes. Here, they are clearly anticipated.

8 Q. And both of these versions of *Georgy Girl* were recorded and
9 released before *Let's Get It On*, correct?

10 A. Yes.

11 Q. And *Georgy Girl*, by the way, was the title song of a very
12 popular movie from the '60s, isn't that correct?

13 A. Yes, it was.

14 Q. And are you aware that the song was nominated for best song
15 at the Oscars?

16 A. I was not aware of that.

17 Q. And it was a number one hit in the United States?

18 A. I'm sorry, what?

19 Q. It was a number one hit in the United States, are you aware
20 of that?

21 A. It wouldn't surprise me. None of these versions were.

22 Q. OK. But in contrast to the version of *Georgy Girl* by the
23 Mexican band leader that you have disparaged, could you imagine
24 that a version of the song being nominated for an Academy Award
25 and achieving number one status on the charts would have some

1 influence?

2 A. It was obviously a very popular song, so I'm not sure what
3 you're asking.

4 Q. Well, you have no idea whether Ed Townsend heard any of
5 these songs, do you?

6 A. I wouldn't be surprised at all if he heard the Seekers
7 version, but these other two versions I would be very surprised
8 if he heard that.

9 Q. I'm not asking if you would be surprised, I'm asking if you
10 know.

11 Do you know whether or not Ed Townsend ever heard
12 either, any version of *Georgy Girl* before?

13 A. Of course I can't know. I wasn't with him.

14 Q. Did you know that the Boston Pops also released their own
15 version of *Georgy Girl* in 1968?

16 A. No, I didn't know that, but it's not surprising.

17 Q. Do you know the Boston Pops version also uses this same
18 combination?

19 A. That wouldn't be surprising. That was basically easy
20 listening music, too, so ...

21 Q. And do you find these versions, the 101 Strings, the
22 orchestra, and the Boston Pops version, more relevant than the
23 version created by someone you characterize as an obscure
24 Mexican band leader?

25 A. I'm sorry, what?

1 Q. Do you find these versions more relevant than the one that
2 you cast off as being recorded by an obscure Mexican band
3 leader?

4 A. OK. You know, I've spent a lot of time in Mexico
5 researching Mexican music. I don't think this is just sort of
6 a casual statement. But he would certainly be obscure to the
7 average American. I mean, how can that be disputed?

8 So, I'm sorry, I don't -- if there is some other
9 question here that you're getting at ...

10 Q. Sure. The question is whether this combination existed
11 before *Let's Get It On*, isn't that the relevant question?

12 A. No, not in my opinion.

13 Q. Well, let's look at the definition of unique.

14 So unique being the only one, so using that
15 definition, you would agree with me, don't you, that *Let's Get*
16 *It On* was not the only one to use the combination of the chord
17 progression with anticipated second and fourth chord, correct?

18 A. I never said that that was unique and I wouldn't say it
19 now.

20 Q. Are you familiar with the song *You've Lost the Sweetest Boy*
21 released in the 1960s?

22 A. Which song?

23 Q. *You've Lost the Sweetest Boy*?

24 A. You lost the what?

25 Q. The sweetest boy. It was recorded by Mary Wells?

1 A. As a matter of fact, I saw it in the slides that you
2 proffered, or that your side proffered, yes.

3 Q. Right. Have you ever --

4 A. I was not aware of that song, no.

5 Q. Are you aware -- I guess then you wouldn't be aware if it
6 was recorded in 1963?

7 A. I am now, yes.

8 Q. Have you ever performed with Mary Wells?

9 A. No. Mary Wilson from the Supremes, not Mary Wells.

10 Q. Are you aware that *You Lost the Sweetest Boy* combines the
11 1,3,4,5 chord progression with anticipated second and fourth
12 chords?

13 A. I listened to it after I received your slides, and I am
14 aware that it occurs three times in the course of the song,
15 three places for about six seconds each time.

16 Q. OK. So it does appear in the song?

17 A. It appears, yes. But it's easily missed because it's a
18 very small part of the song.

19 Q. But it exists?

20 A. It exists, yes.

21 Q. Correct?

22 And did you also notice that *You Lost the Sweetest Boy*
23 is recorded or written in the key of E flat major, which is the
24 same key as *Let's Get It On*; did you notice that?

25 A. I did notice that.

1 Q. So *Let's Get It On* was not the first chord to combine those
2 elements together either, correct?

3 A. Which elements?

4 Q. The chord progression, the anticipation of the second
5 fourth, and that it happens to be in the same key as well?

6 A. I don't think the key is relevant anyway. I've never
7 claimed it was.

8 Q. Combines the two elements you believe is relevant, the
9 chord progression and the anticipation of the second and fourth
10 chord?

11 A. Yes, um-hmm, very briefly.

12 Q. Hold on, please. I would like to move on to the melodies
13 that you have placed at issue in this case.

14 First, I would like to talk about the definition of
15 melody, if we can put a definition on the screen, please.

16 Could you read that to yourself and tell me if you
17 agree with that definition of melody?

18 A. I'm very familiar with that definition, and yes.

19 Q. In fact, you previously swore under oath that this is the
20 proper definition of melody, correct?

21 A. Yes.

22 Q. And so focusing on, I believe -- for the record, I believe
23 that we may have bolded that language, so the record is
24 clear -- an essential element in the formation and recognition
25 of melodies is duration, correct, rhythm?

1 A. Duration and rhythm are not exactly the same thing, but
2 yes.

3 Q. What about metric placement of each note within the bars of
4 melody, that is also essential, right?

5 A. It's another factor.

6 Q. And, in fact, you previously swore under oath at your
7 deposition in this case that what is critical here is the
8 placement of the note, didn't you?

9 A. I don't recall saying that. What is the --

10 Q. Why don't we put it up?

11 A. What is the statement again, please?

12 Q. We'll put it up on the screen.

13 MS. FARKAS: It's the deposition testimony. I think
14 it's 187.

15 Q. So referring you to your deposition testimony in this case
16 where you said, What is really critical here is the placement
17 of the note. The placement of the note on the end of one, and
18 that it is a note that is sustained.

19 Do you see that?

20 Do you remember that testimony?

21 A. Not exactly.

22 Q. Well, do you agree that, when thinking about and discussing
23 melodies, that the placement of the note matters?

24 A. It matters, but I don't know what the context is here. I
25 could be talking about a specific instance where it is really

1 critical in terms of, um, the analysis of the similarity.

2 Q. OK.

3 A. It doesn't mean that it is always, um, what do I say --
4 that it's always really critical.

5 Q. So, generally speaking, duration and metric placement are
6 both essential when you're analyzing melodies, correct?

7 A. One factor along with pitch sequence and other, yes.

8 Q. Yes.

9 A. It's a factor that definitely needs to be considered,
10 um-hmm.

11 Q. And, of course, doing so accurately is also important,
12 wouldn't you agree?

13 A. Yes.

14 MS. FARKAS: Your Honor, this is a good breaking
15 point. I can go on for another ten minutes, but in terms of
16 just subject matter, it's, I think, a convenient point if it
17 works for the court.

18 THE COURT: If you would prefer to stop now, I think
19 it's fair. We'll resume with the usual 11 tomorrow. Keep an
20 open mind. You have a lot to hear still, and something you
21 hear near the end may change your understanding. Don't talk
22 with anybody, even each other, about the case. Stay well and
23 I'll see you tomorrow morning.

24 Good night. Have a good evening.

25 (Adjourned to Thursday, April 27, 2023, at 11:00 a.m.)

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

INDEX OF EXAMINATION

Examination of:	Page
ALEXANDER STEWART	
Direct	232
Cross By Ms. Farkas	307